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CONTENTS

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Notice as to Future Numbers of the Quarterly

Owing to various causes, principally the cost of other activities of the Association, the appearance of the Quarterly in the early part of 1946 was delayed and only three numbers have appeared in 1946. It was expected that the report of the Judicial Council would constitute a 4th number but as the appearance of that is delayed it will appear in the first number for 1947 probably in February. Thereafter, at least one number will appear in each calendar quarter.

Organization of the Bar

Copy of Petition Filed in Court October 15, 1946

In the Matter of the Proposal for the Complete Organization of the Bar in Massachusetts as a Self-Governing Body by Rule of Court.

To the Honorable Justices of the Supreme Judicial Court:

At the annual meeting of the Massachusetts Bar Association at Swampscott, Massachusetts, on June 9, 1946, the following vote was adopted by a vote of 129 in favor to 27 in opposition:

> "That the Massachusetts Bar Association acting by its officers, petition the Supreme Judicial Court to examine the rules and by-laws for an organized self-governing bar which have been evolved by its Committee of Twenty-five and to take such action thereon as the Court may deem proper, including the determination of the question whether the adoption by a rule of Court, of said plan with or without amendment, would be in the interest of the public and the administration of justice, and also an ascertainment of the views of the lawyers of the Commonwealth as indicated by a poll."

As directed, the officers of the Association submit to the Court herewith copies of a pamphlet containing the rules and by-laws referred to in the vote, and petition the Court to examine the same and take action, such as suggested in the vote, or otherwise, as it deems proper in the public interest.

Respectfully submitted,

Massachusetts Bar Association, by
EDWARD O. PROCTOR, *Its President*
HORACE E. ALLEN, *Its Treasurer*
FRANK W. GRINNELL, *Its Secretary*

The pamphlet containing the rules and by-laws referred to in the vote and filed in court with the petition, was printed in the Massachusetts Law Quarterly for October 1945 (Vol. XXX, No. 3) and in the Law Society Journal for February 1946. It was also circulated, during the first six months of 1946, by most of the County bar associations to all their members to provoke discus-

sion. Seven or eight thousand copies of the pamphlet were thus distributed prior to the Massachusetts Lawyers' Institute at Swampscott and the meeting of the Association on June 9, 1946. Copies may be obtained from the Massachusetts Bar Association.

*Order of Notice of Hearing Before the Supreme Judicial Court, April 14, 1947, on the Proposal for Complete Organization of the Bar as a Self-Governing Body.**

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

In the matter of the proposal for the complete organization of the Bar of Massachusetts as a self-governing body by Rule of Court.

Whereas Massachusetts Bar Association, in accordance with a vote of said Association at its annnual meeting on June 9, 1946, has filed a petition praying that this court examine certain rules and by-laws transmitted with said petition which provide for a completely organized self-governing bar in Massachusetts which shall comprise the entire bar, and take such action with respect thereto as the court may deem in the public interest.

Now therefore it is ordered that the petitioner give notice to the members of the bar of Massachusetts and to all other persons interested in said petition, to appear, if they desire to be heard thereon, before the justices of this court at Boston on Monday, April 14, 1947, at ten o'clock A.M., at which place and time the court will hear arguments and receive briefs in the matter of said petition, particularly (1) as to whether the court has jurisdiction to establish an integrated bar, so called, in which every attorney in the Commonwealth must be a member in order to practise law, (2) as to whether the establishment of such an integrated bar would be in the public interest, and (3) as to what rules and by-laws ought to be adopted for the establishment and government of such a bar.

The petitioner is ordered to give notice of this order by mailing a copy hereof, postage prepaid, to each person known to the

* 8,353 copies of the order of notice were mailed to members of the bar. The order was also published in eight newspapers, and in the "Bar Bulletin" for January 1947.

petitioner to be a member of the bar of the Commonwealth, addressed to him at his last known address, and also by publishing an attested copy hereof in some newspaper published in the several counties of Suffolk, Worcester, Hampden, Berkshire and Bristol, all before the fifteenth day of January, 1947.

By the Court,

WALTER F. FREDERICK,
Clerk for the Commonwealth

November 25, 1946.
A true copy,
Attest:
WALTER F. FREDERICK, *Clerk.*

As the Massachusetts Bar Association has taken no action for or against the proposal, and as members of the Association differ, the Executive Committee of the Association has requested Edward O. Proctor and Mayo A. Shattuck to appear and submit a brief in favor, and Walter Powers and Richard Wait to appear and submit a brief in opposition. Others will also appear or file briefs on both sides.

Corporate Fiduciaries

Fiduciary Solication and Advertising—Petition of the Massachusetts Bar Association and Draft Act Filed by Direction of the Executive Committee as a Result of the Postal Card Vote.

To the Honorable Senate and House of Representatives of The Commonwealth of Massachusetts in General Court assembled.

Respectfully represents the Massachusetts Bar Association that, following notice widely distributed to members of the bar throughout the Commonwealth at the Massachusetts Lawyers Institute held in Swampscott on June 8, 1946, to which all members of the bar were invited, an extended discussion took place on the subject of solicitation and advertising for fiduciary busi-

ness. At this meeting copies of the report of the majority of the committee on legal affairs (Senate document No. 520 of 1946) were distributed.

On June 9, at the annual meeting of the Massachusetts Bar Association the subject was again discussed and the following vote taken.

"Resolved: That the Massachusetts Bar Association go on record as favoring legislation to prohibit the solicitation of appointment as a fiduciary and to regulate advertising by corporate fiduciaries; that this question be put to all the membership of the Association on a postcard poll, the result of which is to be taken as the view of the Association."

The resolution was carried by a rising vote of 73 against 7.

Thereafter the record of the meeting and the discussion and vote were printed in the Massachusetts Law Quarterly for October and a postal card attached to the front cover and sent in an envelope with a special notice on the outside to 1,865 members of the Association asking them to read the discussion on the subject and return their vote on the question. A copy of the Quarterly and the envelope are submitted herewith. Postal card read as follows:

> "Please read the information in the annexed copy of the 'Quarterly' on fiduciary solicitation and advertising discussed at the annual meeting of the Massachusetts Bar Association at Swampscott, and then sign, stamp, and mail your vote as a member of the Association on the questions:
>
> "1. Shall the Association go on record 'as favoring legislation to prohibit the solicitation of appointment as a fiduciary?' YES ☐ NO ☐
>
> "2. Shall the Association go on record 'as favoring legislation to regulate advertising by corporate fiduciaries?' YES ☐ NO ☐
>
> .....
>
> Member of Massachusetts Bar Association"

As of December 13, about six weeks after the Quarterly was sent to members, the votes returned were as follows:

"Yes" to both questions.....	433
"No" to both questions.....	73

"Yes" to first question and "No" to second question	17
"No" to first question and "Yes" to second question	42
Total.....	565

Thereafter the Executive Committee of the Association was of the opinion, in view of the terms of the vote quoted, that a draft of legislation should be submitted to the legislature for consideration in accordance with the general terms of the vote which related to no specific form of legislation. After discussion the executive committee voted to petition the legislature for legislation in accordance with the vote of the Association and to submit the accompanying bill, being substantially similar to legislation suggested by the executive committee of the Massachusetts Bar Association in 1924 and again in 1932 as appears in the "Quarterly" filed herewith (p. 26). Wherefore the Massachusetts Bar Association respectfully petitions for the passage of the accompanying bill or other appropriate legislation.

MASSACHUSETTS BAR ASSOCIATION
by its Secretary
FRANK W. GRINNELL
by direction of the
executive committee

AN ACT to regulate Solicitation of Appointment as Fiduciary.

Section 1. Chapter 221 of the General Laws as heretofore amended is hereby further amended by inserting therein the following Section 47.

Section 47. No corporation or person or persons shall advertise for its, his, or their own appointment as executor, administrator, trustee, guardian, or conservator, by other means than the mere statement that they are authorized to act as such, nor shall they solicit such employment or appointment by agents or otherwise; provided, however, that any bank or trust company may include in such statement the names of any of its officers and agents. The Supreme Judicial Court and the Superior Court shall have concurrent jurisdiction in equity upon petition of the attorney general or of the district attorney for the district in which the violation occurred to restrain such violations.

Landmark in Equity

A New Landmark in the History of Massachusetts Equity—The Opinion in Kenyon et al. v. Chicopee et al. (1946 Advance Sheets 1387, Decided December 9, 1946)

As the court in this opinion has sustained the best standards of judicial development, in the common law tradition, of the application of equitable principles by discarding an old arbitrary limitation of equity to the protection of what were called "property" rights (a limitation which many supposed to exist), the part of the opinion dealing with this subject is reprinted in order that it may be understood and appreciated as widely and as promptly as possible.

F. W. G.

Extract from the Opinion

"The demurrers of the defendants O'Connor and Vigeant, unlike the demurrer of the other defendants, are grounded solely on want of equity in that the bill does not allege that any property rights of the plaintiffs are being jeopardized. . . . As to these two defendants we inquire only whether, in the precise circumstances stated in the bill in this case, relief must be denied on the sole ground that equity will not grant relief where no property right is involved. This brings us squarely to the principal question in the case, decisive as to the defendants O'Connor and Vigeant, but important also as to the other defendants, since they too demur on the ground that no property rights are in jeopardy, although they add other grounds of demurrer to which consideration must be given later in this opinion.

"It is said that the formula that equity protects only property rights had its principal origin in dicta of Lord Eldon in *Gee* v. *Pritchard*, 2 Swanst. 402, decided in the year 1818. See Roscoe Pound in 29 Harv. L. Rev. 640 at 642. At all events, the formula has been repeated with little or no qualification in numerous cases in many jurisdictions. Illustrative of these are *Brandreth* v. *Lance*, 8 Paige Ch. 24, *Mead* v. *Stirling*, 62 Conn. 586, 596, *People* v. *McWeeney*, 259 Ill. 161, 172, *White* v. *Pasfield*, 212 Ill. App. 73, 75, *Chappell* v. *Stewart*, 82 Md. 323, *Bank* v. *Bank*, 180 Md. 254, 262, *Hutchinson* v. *Goshorn*, 256 Penn. St. 69, 71, and *In re Sawyer*, 124 U. S. 200, 210. Many cases are collected in 14 Am. L. R.

295, 296. In this Commonwealth the same formula was approved in *Worthington* v. *Waring*, 157 Mass. 421, 423, conceded in *Choate* v. *Logan*, 240 Mass. 131, 134-135, and stated as 'a general rule' in *James R. Kirby Post No. 50* v. *American Legion*, 258 Mass. 434, but was not there applied because a 'sequestration' of the plaintiff's personal property in the form of furnishings and equipment was held to be involved. There are occasional dicta recognizing the rule in others of our cases. See *Kelley* v. *Board of Health of Peabody*, 248 Mass. 165, 168; *Mullholland* v. *State Racing Commission*, 295 Mass. 286, 290; *Mayor of Cambridge* v. *Dean*, 300 Mass. 174, 175. See, however, *Shuman* v. *Gilbert*, 229 Mass. 225, 228.

"But it has long been held that the protection which equity throws over property rights is not limited to the prevention of injury to specific tangible property and includes in proper cases the prevention of unlawful interference with the plaintiff's right to carry on business in general, *Sherry* v. *Perkins*, 147 Mass. 212; *Burnham* v. *Dowd*, 217 Mass. 351, 359, and even extends to the protection of a business against constantly repeated libels or disparagement of goods. *Lawrence Trust Co.* v. *Sun-American Publishing Co.* 245 Mass. 262. *Menard* v. *Houle*, 298 Mass. 546, and cases cited. Compare *Boston Diatite Co.* v. *Florence Manuf. Co.* 114 Mass. 69. Similarly equity has protected by injunction the right of a working man to obtain work whether or not that right is to be deemed strictly a property right. *Fairbanks* v. *McDonald*, 219 Mass. 291 (doubting *Worthington* v. *Waring*, *supra*). *Cornellier* v. *Haverhill Shoe Manufacturers' Association*, 221 Mass. 554, 559-560 (overruling *Worthington* v. *Waring*, *supra*, in so far as that decision prevents relief in equity against blacklisting by employers). In *Baker* v. *Libbie*, 210 Mass. 599, the publication of private letters was enjoined, but this was on the ground of a property right in the letters. It seems that in a proper case equity will grant relief against harassment by vexatious litigation not necessarily related to property rights. *Steinberg* v. *McKay*, 295 Mass. 139, 143.

"In reading the decisions holding or stating that equity will protect only property rights, one is struck by the absence of any convincing reasons for such a sweeping generalization. We are by no means satisfied that property rights and personal rights are always as distinct and readily separable as much of the public

discussion in recent years would have them. But in so far as the distinction exists we cannot believe that personal rights recognized by law are in general less important to the individual or less vital to society or less worthy of protection by the peculiar remedies equity can afford than are property rights. We are impressed by the plaintiffs' suggestion that if equity would safeguard their right to sell bananas it ought to be at least equally solicitous of their personal liberties guaranteed by the Constitution. We believe the true rule to be that equity will protect personal rights by injunction upon the same conditions upon which it will protect property rights by injunction. In general, these conditions are, that unless relief is granted a substantial right of the plaintiff will be impaired to a material degree; that the remedy at law is inadequate; and that injunctive relief can be applied with practical success and without imposing an impossible burden on the court or bringing its processes into disrepute. A number of courts have tended toward this view. Legal writers support it. There is no such body of authority opposed to it in this Commonwealth as to preclude its adoption here.

"Doubtless there are personal rights of such delicate and intimate character that direct enforcement of them by any process of the court should never be attempted. But that is not true in this instance. Here no difficulty need be expected in administering relief by injunction. The plaintiffs' rights are of the most fundamental character. According to the bill they have been violated repeatedly. It is plain that the legal remedies by defending against repeated complaints and bringing successive actions for malicious prosecution or false arrest are not adequate. Such remedies are no more adequate than are the remedies at law for repeated injuries to business interests or repeated trespasses upon real estate or interference with easements. *Davis* v. *New England Railway Publishing Co.* 203 Mass. 470, 478-479. *Greene* v. *Mayor of Fitchburg*, 219 Mass. 121, 127. *Mueller* v. *Commissioner of Public Health*, 307 Mass. 270, 274. *Doody* v. *Spurr*, 315 Mass. 129, 134. *Carter* v. *Sullivan*, 281 Mass. 217, 224. *Terrace* v. *Thompson*, 263 U. S. 197, 214-216."

Declaratory Judgments

Several important opinions handed down this month indicate that the bar is beginning to realize the practical value of the declaratory procedure (which went into effect on November 1, 1945), in securing the determination of controversies.

The case of *National Shawmut Bank* v. *Morey* (1946 Advanced Sheets 1347 decided December 3rd, 1946) arose under the Act of 1935 relating to the Probate Courts, which was continued in existence as to proceedings brought under it, by the later, and broader, act of 1945, but the opinion deals with the subject in the light of this broader act and is of peculiar importance for that reason. The case arose in the probate court.

One question on which a declaratory judgment was sought is described by the court as follows: ". . . the timeworn question whether 'heirs' meant those who were such at the death of the testator or those who would be such if he died immediately after the death of the last surviving life beneficiary—in other words, whether the remainder interests in the trust are vested or contingent."

While the court declined for reasons of discretion to make a declaration on that question, any questions of jurisdiction which may exist in the minds of the bar, were definitely settled. The court says:

> "There is no doubt in our minds that the probate court has jurisdiction to make the declaration . . . but although the probate court had jurisdiction in this case to declare the nature of the future interests . . . even long before those interests should come into possession, it does not follow that the petitioners were entitled to a decree as a matter of right".

The statute and rules expressly recognize judicial discretion to decline a determination, but requires the reason for refusal to be stated in the record. The court says:

> "It seems to us that the existence in the court of discretion of this kind is essential to the successful use of declaratory procedure. Without it the court and the public would have no really effective protection against the presentation of moot cases or of cases involving only remote contingencies, attempts to use the courts for purposes of giving legal advice or for

> answering questions as to which no reasonable doubt could exist, and the fomenting of unnecessary litigation. In *Gray* v. *Spyer*, (1922) 2 Ch. 22, at page 27, Lord Sterndale, speaking of declaratory judgments in a court which has had long experience with them, says, 'Properly used, they are very useful; improperly used, they almost amount to a nuisance.' In the case before us the judge exercised his discretion against making any declaration as to the time of vesting of the remainders. This being a suit in equity, this court upon appeal will itself decide the question of discretion upon the law and the evidence, giving some weight, however, to the action of the trial judge . . . The question of discretion must be decided upon the peculiar facts of each case. In the case before us there are arguments both ways . . . we think that . . . the arguments against the present determination outweigh those in favor of it."

It is noticeable that the reasons of the Supreme Judicial Court in thus deciding "itself the question of discretion upon the law and the evidence giving some weight, however, to the action of the trial judge" appear to differ from the reasons stated by the trial judge for declining to make the determination in the statement of reasons called for by the statute which appears in the printed record of the case (p. 23).

As this procedure, while well known elsewhere, appears to be new to the minds of the bench and bar in Massachusetts, the warning of the court "against the presentation of moot cases or of cases involving only remote contingencies" in an attempt to induce the court into "giving legal advice or answering questions as to which no reasonable doubt could exist" should be noted. On the other hand the "jurisdiction" to determine controversies which are affecting seriously the lives and property of individuals and their relations with others, is fully sustained in accordance with the purpose of the act and the court has recognized that declaratory judgments, "properly used, are very useful".*

Two other very recent cases under the declaratory procedure are *St. Lukes Hospital* v. *Labor Relations Commission* 1946 A. S.

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* Borchard in the preface to his 1st Edition in 1934 (reprinted in his 2nd Edition in 1940) reports that:

> "By statistical count approximately two-thirds of the cases in the English Chancery reports are initiated by summons for a declaratory judgment."

1319 (Nov. 30th) and *School Committee of Cambridge* v. *Sup't of Schools* p. 1373 (decided Dec. 4). This last case should be read in connection with the words "actual controversy" as used in the statute. The very latest case on declaratory judgments, decided on January 10, 1947, is *Hogan* v. *Hogan*, 1947 A. S. 135.

F. W. G.

Proposed Tax Amendments

Important Amendments to Federal Tax Laws Proposed by the Taxation Section of the American Bar Association and Approved by the House of Delegates for Presentation to the Next Congress

The effect of advice given by lawyers to their clients on the taxation of the clients is assuming greater importance every day and it has become imperative for lawyers not only to know what the tax law is, but also what changes are contemplated. The recommendations of the Tax Section of the American Bar Association have usually received careful and sympathetic consideration by Congress and the Treasury Department and, accordingly, should have the careful consideration of all members of the bar.

For several years a number of experienced tax lawyers, including several from Massachusetts, have been studying difficult technical problems in connection with federal taxes including the provisions in the tax laws relative to estate taxes, gift taxes, powers of appointment and the results in taxation of the community property law in certain states. As is generally known, some of the provisions of the federal laws have not only puzzled many lawyers and taxpayers but have caused very unjust results.

These questions have also been discussed in the large and active section on taxation of the American Bar Association and as a result that section submitted about a dozen important recommendations to the House of Delegates at its annual meeting at Atlantic City at the end of November, and these recommendations were unanimously approved for presentation to the next Congress by vote of the House.

As the report not only contains the proposed amendments but also explanatory comments as to the existing law and the reason

for the proposed change, both the proposals and the comments are here reprinted for the information of the Massachusetts bar in order that lawyers may study them, and, if they approve of the proposal, may communicate with their Congressmen in cooperation with the representatives of the American Bar Association to secure the passage of these amendments or to take such other action as they may deem advisable.

We believe that members of the bar may also find, in the comments as to the existing law, some things which may be of importance in connection with the drafting of wills or trusts or other instruments and that *these comments may, therefore, be found helpful to readers in their practice.*

F. W. G.

Report of Section on Taxation As Approved by the House of Delegates

Each recommendation is prefaced as follows:

"*Be It Further Resolved*, That the officers and council of the Section of Taxation are directed to urge the following amendment or its equivalent in purpose and effect, in the proper committees of Congress:"

1. Federal Estate Tax; Taxation of Life Insurance

That the provisions of the Federal Estate Tax Law relating to the taxation of life insurance be amended to make it clear that insurance is to be treated like any other property and affected by all provisions governing the inclusion of other property in a decedent's gross estate, so that when proceeds of policies are receivable by a beneficiary other than a decedent's estate and all the incidents of ownership in respect to said policies were irrevocably transferred by the decedent as a gift during his lifetime and not in contemplation of death, the said proceeds of such policies will not be included in his gross estate.

Proposed Amendment

Section 811 (g) (2) of the Internal Revenue Code is amended to read as follows:

(2) *Receivable by other beneficiaries.*—To the extent of the amount receivable by all other beneficiaries as insurance

under policies upon the life of the decedent which were owned by the decedent at the time of his death or transferred by him during his lifetime in the same manner as other property is included in the gross estate under other subsections of this section.

Subsections (3) and (4) of section 811 (g) of the Internal Revenue Code are hereby repealed.

Comment

At the present time, life insurance may not be assigned or transferred by gift without being included in the estate of the donor if the policy remains in force at the date of death of the donor. This amendment is intended to place an assignment of life insurance on the same basis as an assignment of any other property.

2. Gift Tax—Exclusion for Gifts of Future Interests

Proposed Amendment

Section 1003 (b) of the Internal Revenue Code is amended by adding the following new subparagraph (4):

(4) *Gifts of future interest after 1946*—In the case of gifts of future interest in property made by the donor during the calendar year 1947 and subsequent calendar years, the first $3,000 of such gifts made in each calendar year shall not, for the purpose of subsection (a), be included in the total amount of gifts made during such year.

Comment

At present any gift of a *future* interest is subject to gift tax, irrespective of amount. The proposal is to allow an exemption from gift tax of any such gifts to the extent of $3,000 in any year for all such gifts. The purpose is to remove the necessity for many small returns. The exemption for each year being nominal in amount, the effect on the revenue will be negligible.

3. Estate and Gift Taxes—Property Subject to Power of pointment

That the Federal Estate and Gift Tax Law relating to the taxation of powers of appointment be amended to eliminate the many hardships and inequities present in the existing law.

Be It Further Resolved, That the officers and council of the Section of Taxation are directed to urge the amendments set

forth in *Section I following as the preferred solution* and the amendments set forth in *Section II as an acceptable substitute*, or their equivalent in purpose and effect, upon the proper committees of Congress:

Section 1 ("The Preferred Solution")
Estate Tax Amendment

Section 811 (f) of the Internal Revenue Code is amended to read as follows:

(f) *Powers of Appointment*

(1) Property passing under general power of appointment. To the extent of any property passing under a general power of appointment, which is exercised by the decedent (i) by will, or (ii) by deed executed in contemplation of or intended to take effect in possession or enjoyment at or after his death, or (iii) by deed under which he has retained for his life or any period not ascertainable without reference to his death or for any period which does not in fact end before his death (A) the possession or enjoyment of, or the right to the income from, the property or (B) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money's worth.

A release, renunciation or disclaimer, in whole or in part, by the decedent of a power to appoint shall not cause the property which is subject to such power to be includible in the decedent's gross estate.

(2) Powers created after October 21, 1942, other than general powers of appointment.

(A) *In general*—To the extent of any property appointed to or for the benefit of any others than the spouse of the decedent, spouse of the creator of the power, descendants of the decedent or his spouse, descendants (other than the decedent) of the creator of the power or his spouse, spouses of such descendants, donees described in section 812(d), and donees described in section 861(a) (3), under a power of appointment created after October 21, 1942, other than general powers of appointment, and exercised by the decedent by will, by deed

in contemplation of death, or by deed to take effect in possession or enjoyment at or after his death, or by a deed under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (i) the possession or enjoyment of, or the right to the income from, the property, or (ii) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money's worth. As used in this subparagraph, the term "descendant" includes adopted and illegitimate descendants and the term "spouse" includes former spouses.

(B) *Exercise by creating second power*—If any power to appoint created after October 21, 1942, is exercised by creating another power to appoint, the exercise of such first power shall be considered a transfer of property to persons other than those described in subsection (A) hereof by the decedent exercising such power to the extent of the value of the property subject to such second power to appoint. For the purposes of the preceding sentence, the value of the property subject to such second power to appoint shall be its value unreduced by any precedent or subsequent interest not subject to such power to appoint. For the purposes of this subsection, another power shall not be considered to have been created if the person, upon whom such power is conferred, shall irrevocably disclaim the same prior to the date prescribed for the filing of the estate tax return by the estate of the one creating such second power to appoint.

(C) *Date of existence of power*—For the purposes of this subsection the power of appointment shall be considered to have been exercised even though the exercise of the power takes effect only on the expiration of a stated period after its exercise.

(D) *Power to name fiduciaries*—Any power to name fiduciaries, to fill vacancies among fiduciaries or to remove fiduciaries and appoint successors shall not be considered as a power of appointment, nor shall the resignation of a fiduciary be considered as the exercise of a power held by such fiduciary as to the trust property.

(E) *Non-beneficial powers*—A power to appoint within a restricted class shall not be considered as a power of appointment if the decedent did not have at the time of his death any beneficial interest in the property.

(F) The non-exercise or release of a power of appointment shall not be construed as an exercise thereof.

Gift Tax Amendment

Section 1000 (c) of the Internal Revenue Code is amended to read as follows:

(c) *Powers of Appointment*

(1) Powers created on or before October 21, 1942.

An exercise, release, renunciation or disclaimer, in whole or in part, of a power to appoint which was created on or before October 21, 1942, shall not be deemed a transfer of property by the individual possessing such power.

(2) Power created after October 21, 1942.

(A) *Exercise of general power of appointment*—An exercise of a general power of appointment created after October 21, 1942, shall be deemed a transfer of property by the individual possessing such power.

(B) *In general*—An exercise of a power of appointment created after October 21, 1942, shall be deemed a transfer of property by the individual possessing such power to the extent that the property subject to such power is appointed to or for the benefit of any other than the spouse of such individual, spouse of the creator of the power, descendants of such individual or of his spouse, descendants of the creator of the power or his spouse, spouses of such descendants, donees described in section 1004 (a) (2), and donees described in section 1004 (b). As used in this paragraph, the term "descendant" includes adopted and illegitimate descendants, and the term "spouse" includes former spouses.

(C) *Exercise by creating second power*—If any power to appoint created after October 21, 1942, is exercised by creating another power to appoint, the exercise of such first power shall be deemed to be a transfer of property by the individual exercising such power to persons other than those described in

subsection (B) hereof, to the extent of the value of the property subject to such second power to appoint. For the purposes of the preceding sentence, the value of the property subject to such second power to appoint shall be its value unreduced by any precedent or subsequent interest not subject to such power to appoint. For the purposes of this subsection, another power shall not be considered to have been created if the person, upon whom such power is conferred, shall irrevocably disclaim the same prior to the date prescribed for the filing of the gift tax return by the person creating such second power to appoint.

(D) *Power to name fiduciaries*—Any power to name fiduciaries, to fill vacancies among fiduciaries or to remove fiduciaries and appoint successors shall not be considered as a power of appointment, nor shall the resignation of a fiduciary be considered as the exercise of a power by such fiduciary as to the trust property.

(E) *Non-beneficial powers*—A power to appoint within a restricted class shall not be considered as a power of appointment if the holder of the power does not have any beneficial interest in the property.

(F) The non-exercise or release of a power of appointment shall not be construed as an exercise thereof.

Section II ("The Acceptable Substitute") Estate Tax Amendment

Section 811 (f) of the Internal Revenue Code is amended to read as follows:

"(f) *Powers of Appointment.*—

"(1) Property passing under general power of appointment created on or before October 21, 1942.—To the extent of any property passing under a general power of appointment, created on or before October 21, 1942, which is exercised by the decedent (1) by will, or (2) by deed executed in contemplation of or intended to take effect in possession or enjoyment at or after his death, or (3) by deed under which he has retained for his life or any period not ascertainable without reference to his death or for any period which does not in fact end before his death (A) the possession or enjoyment of, or the right to the

income from, the property, or (B) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money's worth.

"A power of appointment, created on or before October 21, 1942, shall not be deemed a general power of appointment within the meaning of this paragraph (1) if within the time limited by the next sentence of this paragraph it is released in such manner as to reduce it to a power which, if it had been created after October 21, 1942, would be excepted from the definition of power to appoint under subparagraph (A), (B) or (C) of paragraph (2) of this subsection; nor shall such release cause the property which is subject to the power to be included in the decedent's gross estate. The provisions of the preceding sentence shall apply if such power is so released before July 1, 1948, or, if at such date the donee of such power is under a legal disability to release such power, then if such power is so released within six months after the termination of such disability or six months after the termination of any other legal disability so to release arising on or after July, 1948, whichever six months' period terminates later; for the purposes of this sentence a legal disability to release arising on or after July 1, 1948 shall not include a legal disability arising after the expiration of a period in excess of six months during which the decedent was not under a legal disability to release, and an individual in active service in the military or naval forces of United States shall, until the termination of the present war, as proclaimed by the President, be considered under a legal disability to release a power to appoint while such individual is in such service.

"(2) Powers created after October 21, 1942.—To the extent of any property (A) with respect to which the decedent has at the time of his death a power of appointment, or (B) with respect to which he has at any time exercised or released a power of appointment in contemplation of death, or (C) with respect to which he has at any time exercised a power of appointment by a disposition intended to take effect in possession or enjoyment at or after his death, or by a disposition under which he has retained for his life or

any period not ascertainable without reference to his death or for any period which does not in fact end before his death (i) the possession or enjoyment of, or the right to the income from, the property, or (ii) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money's worth. For the purposes of this paragraph (2) the term 'power of appointment' means any power to appoint, created after October 21, 1942, which is exercisable by the decedent either alone or in conjunction with any person, except

"(A) a power to appoint within a class which does not include any others than the spouse of the decedent, spouse of the creator of the power, descendants of the decedent or his spouse, descendants of the creator of the power or his spouse, spouses of such descendants, donees described in section 812 (d), and donees described in section 861 (a) (3), or within any other restricted class, if the power is not exercisable to any extent in favor of the decedent, his estate, his creditors, or the creditors of his estate, even though the persons who may become entitled to the property, or the income from it, in default of the exercise of the power may not be within such class or classes, and even though the decedent may be one of such persons. As used in this subparagraph, the term 'descendant' includes adopted and illegitimate descendants, and the term 'spouse' includes former spouses;

"(B) a power to appoint which is conferred upon the decedent as a trustee or in conjunction with a trustee, or as one of, or in conjunction with, two or more trustees, to the extent that the decedent, acting alone, cannot by the exercise of such power cause the property to be immediately paid over to himself or his creditors or give to himself, his estate, his creditors or the creditors of his estate an indefeasibly vested interest in the property; and

"(C) a power to consume, invade or appropriate property for the benefit of the decedent, to the extent that the exercise of such power (1) is limited by an ascertainable standard other than, or in addition to, a specific amount or percentage of

the property, or (2) is restricted to any period other than one solely with reference to the death of the decedent.

"If a power to appoint is exercised by creating another power to appoint which is excepted under subparagraph (A) from the definition of power of appointment, such first power shall not be considered excepted under said subparagraph from the definition of power of appointment to the extent of the value of the property subject to such second power to appoint. For the purposes of the preceding sentence, a power to pay or apply income or principal to or for the benefit of a person or persons in favor of whom such first power may be exercised which is limited, as to principal, by an ascertainable standard other than, or in addition to, a specified amount or percentage of the property shall not be deemed another power to appoint. Likewise for the purposes of that sentence the value of the property subject to such second power to appoint shall be its value unreduced by any precedent or subsequent interest not subject to such power to appoint.

"For the purposes of this paragraph (2) the power of appointment shall be considered to exist on the date of the decedent's death even though the exercise of the power is subject to a precedent giving of notice or even though the exercise of the power takes effect only on the expiration of a stated period after its exercise, whether or not on or before the date of the decedent's death notice has been given or the power has been exercised.

"A renunciation or disclaimer of a power of appointment created after October 21, 1942, shall not be deemed a release of such power.

"(3) For the purposes of this subsection, a power created by a will executed on or before October 21, 1942, shall be considered a power created on or before October 21, 1942, if the person executing such will dies before July 1, 1948.

Gift Tax Amendment

Section 1000 (c) of the Internal Revenue Code is amended to read as follows:

"(c) *Powers of Appointment.*

"(1) Powers created after October 21, 1942. An exercise of a power of appointment, or a release of a power of appoint-

ment on or after July 1, 1947, shall be deemed a transfer of property by the individual possessing such power. For the purposes of this paragraph (1) the term 'power of appointment' means any power to appoint, created after October 21, 1942, which is exercisable by an individual either alone or in conjunction with any person, except

"(A) a power to appoint within a class which does not include any others than the spouse of such individual, spouse of the creator of the power, descendants of such individual or his spouse, descendants of the creator of the power or his spouse, spouses of such descendants, donees described in section 1004 (a) (2), and donees described in section 1004 (b), or within any other restricted class, if the power is not exercisable to any extent in favor of the donee, his estate, his creditors, or the creditors of his estate, even though the persons who may become entitled to the property, or the income from it, in default of the exercise of the power may not be within such class or classes, and even though the donee of the power may be one of such persons. As used in this subparagraph, the term 'descendant' includes adopted and illegitimate descendants, and the term 'spouse' includes former spouses;

"(B) a power to appoint which is conferred upon such individual as a trustee, or in conjunction with a trustee or as one of, or in conjunction with, two or more trustees, to the extent that such individual, acting alone, cannot by the exercise of such power cause the property to be immediately paid over to himself or his creditors or give to himself, his estate, his creditors or the creditors of his estate an indefeasibly vested interest in the property; and

"(C) a power to consume, invade or appropriate property for the benefit of the donee of the power, to the extent that the exercise of such power (1) is limited by an ascertainable standard other than, or in addition to, a specified amount or percentage of the property, or (2) is restricted to any period other than one solely with reference to the death of the donee of the power.

"If a power to appoint is exercised by creating another power to appoint which is excepted under subparagraph (A) from the definition of power of appointment, such first power shall not be considered excepted under said subparagraph from

the definition of power of appointment to the extent of the value of the property subject to such second power to appoint. For the purposes of the preceding sentence, a power to pay or apply income or principal to or for the benefit of a person or persons in favor of whom such first power may be exercised which is limited, as to principal, by an ascertainable standard other than, or in addition to, a specified amount or percentage of the property shall not be deemed another power to appoint. Likewise for the purposes of that sentence the value of the property subject to such second power to appoint shall be its value unreduced by any precedent or subsequent interest not subject to such power to appoint.

"A renunciation or disclaimer of a power of appointment created after October 21, 1942, shall not be deemed a release of such power.

"(2) Release before July 1, 1947. A release of a power of appointment before July 1, 1947 shall not be deemed a transfer of property by the individual possessing such power.

"This paragraph (2) shall apply to all calendar years prior to 1947 and to that part of the calendar year 1947 prior to July 1, 1947.

"(3) Powers created on or before October 21, 1942. An exercise, release, renunciation or disclaimer (whether on, before, or after January 1, 1943) of a power to appoint which was created on or before October 21, 1942 shall not be deemed a transfer of property by the individual possessing such power. A power created by a will executed on or before October 21, 1942, shall be considered a power created on or before October 21, 1942, if the person executing such will dies before July 1, 1948.

Comment

On October 21, 1942, the Revenue Act of 1942 became effective. It contained a completely new treatment of powers of appointment under the Estate and Gift Tax Law. It soon became apparent that this law was enacted without a full appreciation of the fact that it would apply to numerous situations not contemplated and would create a multitude of hardships and inequities. The taxing authorities concede the need for legislation but have announced no solution. Based on four years of study, two alter-

native revisions have been developed by the Section of Taxation, either of which is considered to be an adequate solution. Both of the recommended revisions restore the law as it existed prior to October 21, 1942, in so far as powers created prior to that date are concerned. This eliminates the retroactive effect of the law which was one of the principal defects of the present law.

The first proposed statute then imposes a tax only on the *exercise* of a power of appointment created after October 21, 1942. Also, in order to give relief in certain family situations, the proposed statute exempts from tax the value of any appointed property to the extent that it is appointed (other than by general power of appointment) to an exempt class defined in the present statute. It is felt that this is a simple and workable approach to the problem. It is easy to understand and apply. The Section of Taxation prefers this solution.

However, other groups and organizations who have been working on this problem have developed a slightly different solution. The Section of Taxation has considered this solution and believes it is also an adequate treatment of the problem, although much more complex. In view of the absolute necessity of legislation on this problem, the Section of Taxation believes this alternative solution should also be approved in order that corrective legislation might not fail in the event that the statute preferred by the Section of Taxation is rejected by Congressional Committees.

The alternative statute is directed primarily at solving the inequities created by the treatment of fiduciary powers under the present law. It follows the theory of the present statute but enlarges the class and types of powers which are exempt from the tax.

4. Gift Tax—Extension of Time for Release of Reserved Powers

That the Federal Gift Tax Law relating to the taxation of certain trusts in which the grantor has reserved certain discretionary powers be amended to extend the time within which the gift tax free release of such powers may be effected, in order to eliminate the hardships and inequities created by the short length of time originally granted.

Proposed Amendment

Section 1000 (e) of the Internal Revenue Code is amended to strike out the date "January 1, 1945" appearing in said section and inserting in lieu thereof the date "January 1, 1948".

Comment

For the protection of taxpayers Congress has extended, from time to time, the period within which one who is the donee of a discretionary power over income may release such power, without payment of a gift tax. The opinion had been widespread that the extension covered all who possessed such power. It appears that the legislation may not be sufficiently broad to cover a grantor who had reserved such powers. There appears to be no proper ground for any discrimination, which the proposal seeks to remedy.

5. Gift Tax—Revision of Gift Tax Returns After the Expiration of the Statute of Limitations.

That the Federal Gift Tax Law relating to the valuation of property transferred by gift be amended to make clear that the value of property in respect to which a gift tax return has been filed may not be revised subsequent to the expiration of the Statute of Limitations.

Proposed Amendment

Section 1016 of the Internal Revenue Code is amended by adding the following new subsection (c):

(c) Except in the case of a false or fraudulent return with intent to evade tax, the amount of any net gifts disclosed in the return shall not be subject to revision, for the purpose of computing the tax on subsequent gifts, after the expiration of the time within which the tax on such net gifts is determinable with respect to the year in which such gifts were made.

Comment

The Commissioner of Internal Revenue in certain cases has attempted to alter the valuation placed by the taxpayer on the property transferred by gift, after the expiration of the statute of limitations with respect to the gift tax return on such property, or to revise exclusions which were allowed or not questioned. It is

his contention that, while he admittedly cannot, after the statute of limitations has run, assert any tax deficiency based on the outlawed gift, he may, for the purpose of placing a subsequent gift in a higher tax bracket, revise the return for the prior year without any statute of limitations. The result is virtually tantamount to arbitrarily extending the statutory period, however long the elapsed time interval.

The taxpayer beyond question places as much reliance on the permanent fixation of his previous gifts (which determine the tax bracket at which assessment of his next gift will begin) as he does on the fact that a tax deficiency is barred as to the prior transfer. In the absence of any fraud, after the expiration of the statutory limitation period, the taxpayer should not be plagued by the possibility of his return being upset. It is the intended purpose of the resolution that it be made clear that the taxpayer can act in complete reliance on the assumption that the matter is finally and for all purposes closed after the expiration of the period of limitations.

6. Excess Profits Tax—Jurisdiction of Tax Court

That the statute extending the jurisdiction of The Tax Court of the United States to include redetermination of excess profits tax deficiencies be amended to include redetermination of the disallowance by the Commissioner of Internal Revenue of an application for excess profits tax relief regardless of whether all of the excess profits tax involved in such application has been paid.

Proposed Amendment

1. Sections 732 (a) and 732 (b) (relating to Tax Court review of abnormalities) are amended to read as follows:

(a) *Petition to the Board.*—If a claim for refund of tax *or application for relief* under this subchapter for any taxable year is disallowed in whole or in part by the Commissioner, and the disallowance relates to the application of section 711 (b) (1) (H), (I), (J), or (K), section 721, or section 722, relating to abnormalities, the Commissioner shall send notice of such disallowance to the taxpayer by registered mail. Within ninety days after such notice is mailed (not counting Sunday or a legal holiday in the Dis-

trict of Columbia as the ninetieth day) the taxpayer may file a petition with the Board of Tax Appeals for a redetermination of the tax under this subchapter. If such petition is so filed, such notice of disallowance shall be deemed to be a notice of deficiency for all purposes relating to the assessment and collection of taxes or the refund or credit of overpayments.

(b) *Deficiency Found by Board in Case of Claim.*—If the Board finds that there is no overpayment of tax in respect of any taxable year in respect of which the Commissioner has disallowed, in whole or in part, a claim for refund *or application for relief* described in subsection (a) and the Board further finds that there is a deficiency for such year, the Board shall have jurisdiction to determine the amount of such deficiency and such amount shall, when the decision of the Board becomes final, be assessed and shall be paid upon notice and demand from the collector.

Comment

It has been held that the Tax Court of the United States has no jurisdiction over the disallowance by the Commissioner of Internal Revenue of a claim filed under the relief provisions of the Act. The Act itself provides that a portion of the tax in dispute may be withheld by the taxpayer until his claim is determined. The purpose of the proposal is to solve this inconsistency and make it clear that the Court may pass upon such claims for relief before the tax is paid.

7. Excess Profits Tax—Collection

That the statute relating to the determination of deficiencies in excess profits tax be amended so as to restrict the assessment and collection of such deficiencies in cases where an application for relief is filed, until such time as the amount of the reduction of excess profits tax under the application for relief is determined.

Proposed Amendment

1. Section 732 (a) (relating to Tax Court review of abnormalities) is amended by adding at the end thereof the following paragraph:

If the Commissioner mails a notice of deficiency in respect of the tax imposed by this subchapter for any taxable year with respect to which the taxpayer has filed an application for relief under section 711 (b) (1) (H), (I), (J), or (K), section 721, or section 722, or if such application for relief is filed by the taxpayer within ninety days after the mailing by the Commissioner of the notice of deficiency, no assessment of such deficiency and no distraint or proceeding in court for its collection shall be made, begun or prosecuted, except as otherwise provided in Section 273, and except as to the amount of the deficiency which exceeds the amount of tax indicated in such application for relief as owing by the taxpayer, until ninety days after the Commissioner shall have made a final determination with respect to such application for relief; and if the taxpayer shall file with the Tax Court a timely petition for redetermination of the disallowance of such application for relief, until the determination of the Tax Court with respect thereto has become final.

Comment

Since 1924 it has been provided by law that the taxpayer may litigate taxes, other than excise taxes, before being called upon to pay them, except in cases where delay might jeopardize collection, where an immediate assessment may be made. This privilege is not accorded where the Commissioner of Internal Revenue determines an excess profits tax liability which the taxpayer disputes on the ground that it is entitled to a computation of its tax under the so-called "relief" provisions. There appears to be no good reason why the tax liability of a single year should not be determined in one proceeding, which is the purpose of the proposed amendment.

8. Tax Court Appointments

Resolved, That the American Bar Association authorizes the officers and Council of the Section of Taxation to bring before the appropriate authorities the considerations that require nominating authorities to exercise single-minded diligence in

selecting appointees to the Tax Court who will serve the public in that capacity with the highest possible degree of usefulness.

Be It Further Resolved, That the influence of the Section of Taxation shall not be used to promote the nomination of any special person, but the officers and Council of the Section may submit a list of not less than four names—listed in alphabetical order and without the indication of any preference—of persons who, if they assume this office, would be fully competent; any such submission of names to be accompanied by a statement to the authorities that the list is not submitted in the interest of any one of the persons named but in the public interest, and that the appointment of any equally qualified person, not on the list, would fully satisfy the concern of the Section that no appointment should be made to the Tax Court of any person unless he has already demonstrated ability and diligence as a lawyer or a judge and unless he is fully qualified physically and mentally to adjust himself to the heavy intellectual burdens incident to the Tax Court office.

Comment

Recent appointments to the Tax Court of persons of 70 years of age or over, with no substantial previous acquaintance with this specialized branch of our law, has seriously handicapped the work of the Court. It is imperative that some measure be available to assure better appointments. The Section of Taxation has the greatest interest in this situation. The procedure suggested is calculated to produce the desired result in a non-partisan manner.

9. Income Tax—Division of Income Between Husband and Wife

That the provisions of the Federal Income Tax Law be so amended as to permit the division of income between husbands and wives by amending section 51 (b) of the Internal Revenue Code by striking out the third sentence of said section and inserting a new sentence in place thereof to provide that the tax on a joint return shall be twice the tax computed on one-half of the aggregate net income, as follows:

Proposed Amendment

Section 51 (b) of the Internal Revenue Code is amended by striking out the third sentence of said section and substituting in lieu thereof the words:

> If a joint return is made the tax shall be twice the tax computed on one-half of the aggregate net income shown on the joint return; and the liability with respect to the tax shall be joint and several.

Comment

In the Federal taxation of income, an advantage is enjoyed by residents of community property states. In one state (Texas) all income, whether earned or from investments, may be reported, one half by each spouse. In the others, all earned income may be so reported, the rule varying with respect to income from investments. In a similar manner, in the common-law states, income from investments may be divided between spouses by gifts or through common ownership, but earned income must be reported in common-law states by the one who earns it.

This has created a discrimination in income tax imposed upon husband and wife between those who live in different states, and between earned and invested incomes. The proposed resolution seeks to tax all married couples alike with respect to income tax, regardless of residence or type of income.

This resolution was adopted by a vote of approximately two-thirds of some 100 members in attendance at the section meeting, after thorough discussion. The opposition appeared to be based upon the following principal objections:

(a) The resolution was first proposed at the meeting of the section, and had no consideration in any committee;

(b) Unlike most proposals advocated by the Section, it provides for a change in the substantive law;

(c) The subject matter is one which might better have been submitted to the Assembly of the Association;

(d) The Federal Estate Tax Law is unjust to residents of community property states, imposing greater taxes than on residents of common-law states. If the purpose is to place all persons on an equal footing, the Estate Tax Law must also be

revised. The resolution, therefore, only does half the job necessary to provide equality;

(e) The burdens associated with the community system of property are onerous and the advantages under the Federal taxing statute are justified. If residents of common-law states are willing to assume such burdens, they may have a like advantage by setting up the community system in their own state, as Oklahoma did;

(f) Substantially the same amount of tax must be collected from individuals. To accomplish this, rates will have to be increased in the lower brackets. Unless relief is given, single persons, widows and widowers with dependents will be called upon to pay greatly increased taxes. That it was the responsibility of the proponents to have presented a program of legislation which was well rounded and would cure the inequities which would otherwise be created by their proposal.

The proponents maintained that there had been a pressing need for many years to remove the discriminations mentioned, that compulsory joint returns had been sought and defeated, that the problem was one which had been considered by tax lawyers for many years and with which they were thoroughly familiar, that the present method was simple and so easily understood that it did not require extensive consideration, that it was the duty of the Bar to show the way to a solution, that the proposed solution would solve many problems now arising out of the creation of trusts and family partnerships, that a recommendation of a needed reform should not be postponed until other allied reforms could be perfected, and that other inequities which exist or may be created would be recognized and remedied by the Congress; that there has been no answer on the merits to the soundness of the solution proposed.

10. Estate and Gift Taxes—Community Property

That the provisions of the Federal Estate and Gift Tax Law relating to community property be amended to eliminate the hardships and inequities present in the existing law, and to place the citizens of community property states on a basis of equality with the citizens of common law states; and that pending a study of methods of effecting more complete equality,

this aim be achieved by amending sections 811 and 1000 of the Internal Revenue Code.

Estate Tax Amendment

Section 811 of the Internal Revenue Code is hereby amended by striking out the following subsections:

(d) (5) "Transfer of Community Property in Contemplation of Death, etc."

(e) (2) "Community Interests"

(g) (4) "Community Property"

Gift Tax Amendment

Section 1000 of the Internal Revenue Code is hereby amended by striking out subsection (d) "Community Property".

Comment

The Revenue Act of 1942, in an effort to correct what was considered an existing discrimination in estate and gift taxes in favor of residents and decedents of community property states, amended the Internal Revenue Code in such manner that other inequities were created. Consistent with the purposes of the preceding resolution which deals with the dividion of income between spouses, the Section recommends that the law be restored to its status prior to the 1942 amendment, to be followed by a more thorough study of the legislation necessary to place the residents of all states on the same basis.

11. Pension and Profit Sharing Trusts

That enhancement of value of investments of pension and profit-sharing trusts and of property and securities put into such trusts by employers should be treated, on distribution within one taxable year, as a capital gain, consistently with the present provision under section 165 (b) of the Internal Revenue Code in cases in which distribution of amounts in excess of the contributions of the employee is made by reason of the employee's separation from the service of the employer.

Proposed Amendment

Subsection 165 (b) of the Internal Revenue Code is hereby amended so that the subsection as amended will read as follows:

(b) Taxability of Beneficiary. The amount actually distributed or made available to any distributee by any such

trust shall be taxable to him, in the year in which so distributed or made available, under section 22 (b) (2) as if it were an annuity the consideration for which is the amount contributed by the employee, except that

(1) If the total distributions payable by reason of an employee's separation from the service, or by reason of the death of an employee whether such death occurs before or after the employee's separation from the service, are paid to the distributee within one taxable year of the distributee, the excess of the sum of such distributions to the extent exceeding the amounts contributed by the employee, reduced by any amounts theretofore distributed to him which were not includible in taxable income, shall be considered a gain from the sale or exchange of a capital asset held for more than six months, and

(2) If the total distributions payable with respect to any employee are paid to the distributee within one taxable year of the distributee on account of any reason other than the employee's separation from the service, the amount of such distributions to the extent exceeding the amounts contributed by the employee and the amounts contributed by the employer for the benefit of the employee, shall be considered a gain from the sale or exchange of a capital asset held for more than 6 months. Payments of sickness or disability benefits with respect to any employee in prior years shall not be counted in determining, under this subsection, whether the total distributions payable with respect to such employee are paid to the distributee within one taxable year of the distributee. This amendment shall be applicable with respect to taxable years beginning after December 31, 1941.

Comment

This is the same recommendation that was made at the Cincinnati meeting and approved by the House of Delegates, except for certain changes which are deemed equitable. We are informed that the Bureau has construed section 165 (b), as it now stands, to require, as a basis for the applicability of the capital gains rate, not only that all payments with respect to the employee on account of his separation from service be made within a single year, but that no other payments shall have been made previously with re-

spect to that employee. This has the effect of denying the capital gains rate to employees or their beneficiaries in cases in which previous payments have been made, even though small in amount; for example, payment of sickness or disability benefits.

We are also informed that the statute, as it now stands, is construed not to afford the benefit of the capital gains rate to the beneficiaries of an employee who has left the service of the employer, and dies in a later year after receiving retirement benefits in any year prior to death.

It is recommended that the capital gains rate benefit be afforded in cases in which the entire payments on account of separation from the service, or on account of death, are paid within a single year. The changes from our recommendation No. 11, approved last year, are to accomplish this purpose.

12. Pension and Profit Sharing Trusts

That the time within which a taxpayer on the accrual basis may contribute amounts under a stock bonus, pension, profit sharing or annuity plan, and secure a deduction therefor in the year of accrual, be extended from sixty days after the close of the taxable year of accrual, as now provided, to seventy-five days after the close of the taxable year of accrual, to the end that adequate time be afforded for the determination and payment of such contributions.

Proposed Amendment

Section 23 (p) (1) (E) (relating to contributions of an employer to an employees' trust or annuity plan) is amended by changing "sixty days" to read "seventy-five days", so that said section 23 (p) (1) (E) as amended will read as follows:

> (E) For the purposes of subparagraphs (A), (B) and (C), a taxpayer on the accrual basis shall be deemed to have made a payment on the last day of the year of accrual if the payment is on account of such taxable year and is made within seventy-five days after the close of the taxable year of accrual.

Comment

The payments under many plans are determinable only when the audited results of the year's operations are known. Some em-

ployers have difficulty in obtaining final and definite figures showing the results of such operations within 60 days. It is not considered that a short extension, to 75 days as recommended, could lead to any abuses. It will be a considerable help to many employers. The period of time recommended, 75 days, corresponds substantially to the period of two and one-half months within which payments of salaries to officers who are stockholders must be made, and to the time when tax returns (without the benefit of special extensions) must be filed.

Contribution Among Tortfeasors

The Proposed "Uniform Contribution Among Tortfeasors Act."

This act prepared by the National Conference of Commissioners on Uniform State Laws for recommendation to the various States, was submitted to the Massachusetts legislature in 1946 on petition of John A. Daly of Cambridge (one of the Massachusetts Commissioners) on behalf of the Commissioners, as Senate No. 436. It will be introduced again by Mr. Daly at the coming session. As it concerns matters of state-wide interest to all practising lawyers and their clients the text of the act with an introductory note by Mr. Daly on behalf of the Commissioners, and other information as to the history of the subject, is printed so that members may consider the subject and express their views if they wish. The other Massachusetts Commissioners, besides Mr. Daly, are Willard B. Luther and Jean Sisson.

Introductory Note by John A. Daly

The Uniform Contribution among Tortfeasors Act is designed to remedy what has been felt by many lawyers to be an unrealistic and unjust application of a legal theory. That the law will not help a "wrong doer" is a sound general proposition. The error in the application of this principle to joint tortfeasors lies in classing the tortfeasor as a "wrong doer", merely because he has subjected himself to legal liability in tort. The Act reverses the

ancient doctrine that there can be no contribution between tortfeasors. It, similarly, does away with another ancient doctrine that a release of one joint-tortfeasor bars further suits against the others.

The aim of the Act is to assure an injured plaintiff of his right to recover against whoever is liable to him, while at the same time assuring defendants that, as between themselves, they will pay what is fair, no more, no less, and that payment, or freedom from payment, will not be made dependent on accident or the astuteness of counsel. No one will be hurt by this Act. The total damages to be recovered in tort actions will not be increased. If, in some particular case, a clever defendant can no longer get off scot free, while a less fortunate one pays all, no one should consider this anything harmful. There is also provision for apportionment of liability according to proportionate guilt. This is only elementary fairness. It is done in admiralty and was the basis of our statute for recovery for wrongful death.

The Act was promulgated by the Conference of the Commissioners for Uniform Laws in 1939. It has been passed by the following states and territories:—Arkansas, Hawaii, Maryland, Michigan, Rhode Island, South Dakota.

The History of the Contribution Doctrine

An earlier bill on the subject was introduced in 1934 and referred to the Judicial Council by the legislature with a request that the Council investigate "the subject matter." The Council did not recommend the bill then referred to it, but reported the following information for the assistance of the legislature in case the change in rule of substantive law involved was to be considered (as the Council then suggested that "the subject deserves serious consideration").

Extract from 10th Report of Judicial Council (pp. 49-51)

"The doctrine of contribution has been in force for many years in the admiralty courts and the different common law doctrine, which has been much criticized, developed apparently in the mind of Lord Kenyon in 1799. The admiralty rule and its history are explained in 'Hughes on Admiralty,' 2nd Ed., pp. 312-326, and 1 'Benedict's Admiralty,' Sections 353 and 416. The latest discussion of the common law doctrine of no contribution

appears in the report of a commission appointed by the Lord Chancellor and presided over by the Master of the Rolls, Lord Hanworth. This report (which appeared in July, 1934) is entirely devoted to the discussion of the common law doctrine of no contribution. As the report is not long and contains the judgment of leading members of the English bench and bar in favor of a modification of the doctrine, we reprint the report in full in appendix D to this report.

"As there pointed out, the problem of contribution arises not only in connection with 'joint tortfeasors,' but also in connection with independent tortfeasors whose negligence or other legally wrongful acts contribute to the same resulting damage.

"The questions of allowing contribution between tortfeasors and the limitations, if any, of the common law rule of 'no contribution' are questions primarily of substantive law. The purpose of a free system for joining parties who may be liable for contribution, once the doctrine of contribution is recognized, is a question of procedure to avoid multiplicity of suits with the incidental piling up of expense, multiplication of papers, etc., and to allow settlement of the whole matter in one proceeding. This has been accomplished in admiralty by relatively simple rules of court, notably Admiralty Rule 56 of the Supreme Court of the United States quoted in full in a footnote.* The leading opinion of Judge Addison Brown in the case of *'The Hudson,' 15 Fed. 116,* discusses the matter at length. It was out of that opinion that Admiralty Rule 56 developed.

"There are no juries in the admiralty courts. This simplifies the administrative problem under the rules as to joinder of parties. As far as cases tried without juries are concerned, there seems to be no reason why state court judges could not deal with the doctrine of contribution and the apportionment of damages as the federal judges do in admiralty. How much of an obstacle jury trial would prove in the administration of the doctrine of contribution is a question. It is not clear whether there is any more likelihood of confusion than exists today when half a dozen suits are brought against different persons and they are all consolidated for trial together. It might be practicable for the court to obtain from the jury an answer to a special question on which the court could then apply the rule of contribution in framing the judgment."

The doctrine of "contribution", however, is not dependent on the joinder of parties. Under Section 7 of the proposed act the matter of joinder is an administrative matter in the discretion of the court on motion like the question of consolidation of several actions for trial under existing practice.

The Text of the Act

An Act concerning contribution among tortfeasors, release of tortfeasors, procedure enabling recovery of contribution and making uniform the law with reference thereto.

Section 1. — *Joint Tortfeasors Defined.* — For the purposes of this act, the term "joint tortfeasors" means two or more persons jointly or severally liable in tort for the same injury to person or property, whether or not judgment has been recovered against some or all of them.

Section 2. *Right of Contribution; Accrual; Pro Rata Share.* — (1) The right of contribution exists among joint tortfeasors.

(2) A joint tortfeasor is not entitled to a money judgment for contribution until he has by payment discharged the common liability, or has paid more than his pro rata share thereof.

(3) A joint tortfeasor who enters into a settlement with the injured person is not entitled to recover contribution from another joint tortfeasor whose liability to the injured person is not extinguished by the settlement.

(4) When there is such a disproportion of fault among joint tortfeasors as to render inequitable an equal distribution among them of the common liability by contribution, the relative degrees of fault of the joint tortfeasors shall be considered in determining their pro rata share.

Section 3. *Judgment against One Tortfeasor.* — The recovery of judgment by the injured person against one joint tortfeasor does not discharge the other joint tortfeasors.

Section 4. *Release; Effect on Injured Person's Claim.* — A release by the injured person of one joint tortfeasor, whether before or after judgment, does not discharge the other tortfeasors unless the release so provides, but reduces the claim against the other tortfeasors in the amount of the consideration paid for the release, or in any amount or proportion by which the release provides that

the total claim shall be reduced, if greater than the consideration paid.

SECTION 5. *Release; Effect on Right of Contribution.* — A release by the injured person of one joint tortfeasor does not relieve him from liability to make contribution to another joint tortfeasor, unless the release is given before the right of the other tortfeasor to secure money judgment for contribution has accrued and provides for a reduction to the extent of the pro rata share of the released tortfeasor of the injured person's damages recoverable against all of the other tortfeasors.

SECTION 6. *Indemnity.* — This act does not impair any right of indemnity under existing law.

SECTION 7. *Third Party Practice; amended Declarations and Pleadings; Counterclaims and Cross-complaints and Motion Practice.* — (1) Before answering, a defendant seeking contribution in a tort action may move ex parte, or, after answering, on notice to the plaintiff, for leave as a third party plaintiff to serve a summons upon a person not a party to the action who is or may be liable as a joint tortfeasor to him or to the plaintiff for all or part of the plaintiff's claim against him. If the motion is granted and the summons is served, the person so served, hereinafter called the third party defendant, shall make his defence to the declaration of the plaintiff against the third party plaintiff in the same manner as defences are made by an original defendant to an original declaration. The third party defendant may assert any defences which a third party plaintiff has to the plaintiff's claim. The plaintiff shall amend his pleadings to assert against the third party defendant any claim which the plaintiff might have asserted against the third party defendant had he been joined originally as a defendant. The third party defendant is bound by adjudication of the third party plaintiff's liability to the plaintiff, as well as of his own liability to the plaintiff and to the third party plaintiff. A third party defendant may proceed under this section against any person not a party to the action who is or may be liable as a joint tortfeasor to him or to the third party plaintiff for all or part of the claim made in the action against the third party defendant.

(2) When a counterclaim is asserted against a plaintiff, he may cause a third party to be brought in under circumstances which under this section would entitle a defendant to do so.

(3) A pleader may either —

(A) State as a cross-claim against a co-party any claim that the co-party is or may be liable to the cross-claimant for all or part of a claim asserted in the action against the cross-claimant; or —

(B) Move for judgment for contribution against any other joint judgment debtor where in a single action a judgment has been entered against joint tortfeasors, one of whom has discharged the judgment by payment, or has paid more than his pro rata share thereof. If relief can be obtained, as provided in this subsection, no individual action shall be maintained to enforce the claim for contribution.

(4) The court may render such judgments, one or more, as may be suitable under the provisions of this act.

(5) As among joint tortfeasors, against whom a judgment has been entered in a single action, the provisions of section two, subsection (4), of this act shall apply, if the issue of proportionate fault is litigated between them by cross-complaints in the action.

SECTION 8. *Constitutionality.* — If any provision of this act or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provisions or applications and to this end the provisions of this act are declared to be severable.

SECTION 9. *Uniformity of Interpretation.* — This act shall be so interpreted and construed as to effectuate its general purposes of making uniform the law of those states that enact it.

SECTION 10. *Short Title.* — This act may be cited as the Uniform Contribution among Tortfeasors Act.

SECTION 11. *Repeal.* — All acts or parts of acts which are inconsistent with the provisions of this act are hereby repealed.

SECTION 12. *Time of Taking Effect.* — This act shall take effect on

Georgia and Massachusetts

Could the Georgia Governorship Mess Happen under the Massachusetts Constitution?

(From the Boston Herald of January 26, 1947)

Editor of the Herald:

In your editorial of Friday, January 17, 1947, you refer to the conflicting claims to the governorship in Georgia and suggest that the Massachusetts Constitution "is equally vague on what happens if a governor-elect should die before taking the oath of office." You also refer to the 64th amendment as the "most pertinent" provision. I think it is fortunate, as you point out, that Senate President Nicholson has raised this question with a view to clearing up any doubt which may exist so that no such controversy as now appears in Georgia can arise in Massachusetts. I suggest, however, that the problem is covered by the existing constitutional provisions and that, if the legislature is not convinced of this, the question presents not only a sufficiently "important question of law" but also a sufficiently "solemn occasion" to warrant the Senate or the House in requiring the opinions of the justices of the Supreme Judicial Court under Article II of Chapter III of the Constitution before proposing an amendment to the Constitution which may be unnecessary. Unnecessary amendments to that document should not be multiplied.

The 64th amendment to which you referred in your editorial is the one providing for bi-ennial elections. While, as you state, it provides that the governor, lieutenant-governor and councillors shall hold their offices "until their successors are chosen and qualified" it does not state who those successors are. But there was another amendment (the 55th) which was also submitted to the people and ratified by them in 1918 so that it took effect *at the same moment* with the 64th amendment, which was voted on at that same election. That being the case, these two *must* be construed together and the 55th amendment provides that "whenever the offices of governor and lieutenant-governor shall both be vacant, by reason of death, absence from the commonwealth, *or otherwise*, then one of the following officers in the order of succession herein named . . . shall, during such vacancy," have full power and authority to act as governor. The officers named are

"the Secretary, Attorney-General, Treasurer and Receiver-General and Auditor." The words "or otherwise" are so broad as to cover every conceivable cause of a vacancy, whether by the death of the elected persons before qualifiying or for any other reason. If therefore, both the governor and the lieutenant-governor should die before qualifying, then "their successors" mentioned in the 64th amendment would necessarily be the officers named in the 55th amendment, which took effect at the same instant as the 64th. Massachusetts, therefore, would not be without a constitutional governor by succession if both the governor and the lieutenant-governor died before qualifying nor would a defeated governor "hold over". Whether a specific provision for a special election under such circumstances should be provided for and whether it would be possible under the Constitution for the general court to provide by statute for such a special election *in such a special situation* without any change in the Constitution, is another matter. I am inclined to think, and therefore suggest, that such a statutory provision for a special election in such a situation would be within the broad legislative powers of the General Court under Article IV of Chapter I of the Frame of Government. I may perhaps be wrong and may have overlooked something, but if the solemn question of amending the fundamental law is to be seriously discussed, I suggest that the occasion is sufficiently "solemn" to warrant the submission of these questions to the justices of the Supreme Judicial Court.

FRANK W. GRINNELL

Supplement to Crocker's Notes

Massachusetts Conveyancers' Association
The Samuel T. Harris Memorial Fund

Twelfth Supplement of Notes to the Sixth Edition of Crocker's "Notes on Common Forms" prepared by the Editor, R. D. Swaim, for the Massachusetts Conveyancers' Association. The Earlier Supplements have been reprinted by permission in the Massachusetts Law Quarterly, January-March, 1939; July-September, 1939; January-March, 1940; July-September, 1940; March, 1941; November, 1941; April, 1942; April, 1943; December, 1943; October, 1944.

The following are noted among the Massachusetts Decisions in Advance Sheets and in the Acts of 1944, 1945, and 1946 following the Eleventh Supplement up to 1946 Advance Sheets, page 1232, and in the 1946 statutes. References in the left margin are to the Sections in Crocker to which the notes apply.

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94 Deed by husband to his wife and himself as tenants by the entirety creates joint tenancy.

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143 Chap. 418 Acts 1945—Guardians or conservators may by decree of Probate Court be authorized to sell, mortgage or lease tenancy by the entirety or real estate of ward in conjunction with other tenant by the entirety. Previous conveyances validated.

622 Deed—trust—where notice to beneficiary necessary.

Aronian v. *Asadoorian*, 315 Mass. 274.

174 Restrictions—where grantor had no remaining land, personal to grantor. Where remaining land burden is on owners to prove appurtenant thereto.

Harrington v. *Anderson*, 316 Mass. 187.

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366 Mortgage debt—oral modification of terms of payment sustained.

492 *Siegel* v. *Knott*, 316 Mass. 526.

423 Loans for repairs etc. 1946 Acts Ch. 438.

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543 Ch. 120 Acts 1945 gives court latitude in allowing time for recording copy of notice in petition to authorize foreclosure of mortgages of Soldiers & Sailors.

536 Conduct that may chill the bidding.
Union Market National Bank v. *Derderian*, 318 Mass. 578.

537 Corrected affidavit may be recorded with approval of Land Court 1946 Acts Ch. 204.

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813 Omitted Child—remedies.
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843 Insurance—discussion of division of proceeds after a fire between life tenant and remainderman.
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851 Time of vesting—discussion of rules for determination.
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818 Heirs at law—discussion of rules for time of determination in devise to heirs at law after other estates.
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810 Heirs—husband and wife as heirs of each other and the
829 $5,000 clause.
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35 1945 Chap. 408—Minor G. I.'s may execute instruments.

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772 1945 Chap 339—Attachments—to survive must be brought forward every six years.

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878 Taxes—certain exemptions for land owners in the military service. 1943 Chap. 412.

880 Tax Title—payment of subsequent taxes on redemption.
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876 1945 Chap. 78—requires purchaser of land from a town
883 after foreclosure of a tax title to have his deed recorded.
876 1945 Chap. 226—Tax Titles—foreclosure decree cannot be
886 attacked by other than the petitioner after one year.
884 1945 Chap. 267—Tax Title—notice of invalid to be given by Collector to the holder.
884 1945 Chap. 333—Taxes—reassessment of invalid and lien. Acts 1945 Chap. 511. Sewer assessments for new and also old sewers in Boston a lien, effective Jan. 1, 1946.
765 Lien for real estate tax.

Boston Five Cents Savings Bank v. *Boston*, 318 Mass. 183.

374 Suit for real estate taxes. 1946 Acts Ch. 251.
707 Marine railway and machinery—part of real estate for taxation.

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885 Perfecting tax titles for low value land. 1946 Acts Ch. 302.

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178 Licensing by selectmen does not authorize an unauthorized use.

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178 Proceedings of planning board prior to adoption of by-law discussed—stripping of loam forbidden—extension of non-conforming gravel pit discussed.

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178 1945 Chap. 107—Revere Zoning law validated.
178 1945 Chap. 167—City Council or Selectmen may act for three months as Board of Appeal pending appointment of board.
178 Variation of zoning by Board of Appeal should be only in exceptional circumstances.

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178 Variances by Board of Appeals.

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178 Authority of Board of Appeal to allow up to three family house, 1946 Acts Ch. 561.

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174 General scheme—building and garage on each lot does not
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721 rescission.
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153 Easement—Surcharge. Intention at time of grant.
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108 Easement—reference to a plan showing a way may not always create a way. Registered land not subject to implied easement.
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162 Implied Easement for canal.
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164 Public way by prescription.
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151 Right of way—a way granted over a lot gives a sufficient way and need not cover the whole lot.
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732 Tenancy at will—not terminated by simultaneous conveyance from landlord through conduit to landlord in her married name. No dower in conduit's wife.
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732 Tenancy at will—notice to terminate—rent period.
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1945 Chap. 445—provisions in leases whereby lessee protects lessor from liability for landlord's acts void.

217 Tenants in Common—partners on termination of partnership.
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732 Summary Process may be stayed three months. 1946 Acts Ch. 43.

732 On first notice to quit tenant at will may pay up in five days and prevent determination. 1946 Acts Ch. 202.

749 Endorsement of rent check stating no waiver of former breaches not sufficient.
Whitehouse Restaurant v. *Hoffman*, 1946 Adv. Sh. 1009.

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876 Reformation of mortgage of registered land to include other land—rights discussed.
Wareham Savings Bank v. *Partridge*, 317 Mass. 83.

876 Correction of original decree of registration must be by some seasonable recognized proceeding for review.
Hill v. *Taylor*, 1945 Adv. Sh. 1183.

876 Registered land not subject to implied easement.
Goldstein v. *Beal*, 317 Mass. 750.

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772 1945 Chap. 339 attachments expire in 6 years.

867 Estate tax—Lien attaches to the interest of a deceased tenant by the entirety and is superior to mortgages given by the surviving tenant to an innocent mortgagee and to local taxes accruing after the death. No recording of notice of the lien under R. S. Sec. 3186 is required.
Detroit Bank v. *U. S.* 87 L. Ed. Adv. Ops. 266, U. S. Sup. Court Jan. 4, 1943.

644 Records—discussion of what are "public records"—Tax Collectors' books are not.
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8 Recording a tax deed of registered land on unregistered side gives no title.
Boston v. *De Grasse*, 317 Mass. 523.

543 1945—Chap. 120—Recording notice of foreclosure in proceedings under Soldiers & Sailors C.R. Act.

375 1945—Chap. 130—Recording certificate of payment of taxes on property of another.
1945—Chap. 570—Town Clerk's record of birth, marriage or death prima facie evidence.

628 Photostatic records at Middlesex. 1946 Acts Ch. 44.

ROGER D. SWAIM

SENATE No. 450

The Commonwealth of Massachusetts

REPORT

OF THE

SPECIAL COMMISSION

RELATIVE TO THE

DISTRICT COURT SYSTEM

OF THE

COMMONWEALTH

(UNDER CHAPTER 66 OF THE RESOLVES OF 1945)

DECEMBER 4, 1946

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The Commonwealth of Massachusetts

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By the Governor.

Russell S. Riley, Braintree.

Lowell S. Nicholson, Boston, Secretary.

The Commonwealth of Massachusetts

REPORT OF THE SPECIAL COMMISSION RELATIVE TO THE DISTRICT COURT SYSTEM OF THE COMMONWEALTH.

BOSTON, December 4, 1946.

To the General Court of Massachusetts.

This Commission was created by chapter 66 of the Resolves of 1945, approved July 23, 1945, which reads as follows: —

RESOLVE PROVIDING FOR AN INVESTIGATION AND STUDY BY A SPECIAL COMMISSION RELATIVE TO THE DISTRICT COURT SYSTEM OF THE COMMONWEALTH.

Resolved, That an unpaid special commission, to consist of the committee on the judiciary and one person to be appointed by the governor, with the advice and consent of the council, is hereby established to make an investigation and study of the district court system of the commonwealth, with a view to recommending such changes in said system as it may deem necessary or desirable. In making its investigation and study hereunder, said commission shall consider the subject matter of current senate document numbered three hundred and sixty-seven, of current house documents numbered three hundred and eighteen, six hundred and forty-four and six hundred and forty-five, and the recommendations of the judicial council contained on pages twenty-eight to thirty-three, inclusive, of its twentieth report. Said commission may expend for expenses and clerical and other assistance such sums, not exceeding, in the aggregate, three thousand dollars, as may hereafter be appropriated therefor. Said commission shall report to the general court the results of its investigation and study, and its recommendations, if any, together with drafts of legislation necessary to carry said recommendations into effect, by filing the same with the clerk of the senate on or before the first day of February in the year nineteen hundred and forty-six.

By subsequent orders the time for filing the report of the Commission under the foregoing resolve was extended to December 4, 1946.

In accordance with the terms of the resolve, His Excellency the Governor appointed Russell S. Riley, Esq., of Braintree to serve on the Commission with the members of the Committee on the Judiciary.

The Commission met for the first time on September 21, 1945, and elected Senator Mackay, chairman; Representative Ramsdell, vice chairman; Representative Howard, clerk; and Lowell S. Nicholson, Esq., of Boston, as permanent secretary.

The Commission has held twenty-one meetings, including three public hearings and two private sessions with the members of the Administrative Committee of the district courts.

The Commission has studied and considered all of the documents enumerated in the foregoing resolve. Moreover, it has had the advantage of reports of prior commissions and committees which have dealt with the subject of the district courts. It has also considered information and suggestions which have been obtained by letters and in answer to questionnaires from the justices and special justices and clerks of the district courts, from bar associations, and from individual members of the bar who have special knowledge and interest in the district courts of Massachusetts.

After studying the district courts for fifteen months the members of the Commission find themselves in agreement upon the premise that our so-called "system" of district courts should be improved, but divided into two camps as to the method of improvement. In the Majority Report eleven members of the Commission recommend that full-time judicial service be established in sixty-eight of our seventy-two district courts, and that the Administrative Committee of the district courts be given further administrative powers and in particular the power to assign duties to presiding justices in addition to the sittings in their own courts. In the Minority Report seven of the members of the Commission recommend full-time judicial service by the presiding justices of

twenty of our busiest courts, and further study relative to future extension of full-time service to the other courts.

These two views are presented to the General Court for its consideration in the Majority Report and Minority Report which appear on the following pages.

MAJORITY REPORT.

To the General Court of Massachusetts.

Evolving out of the old trial justice or justice of the peace courts and having been set up, one by one as the need seemed to require, for the purpose of providing, in the various communities, a convenient and speedy trial and disposition, without a jury, of certain minor misdemeanors, the Legislature has from time to time, added to the scope and powers of the district courts so that, with certain exceptions, they have concurrent jurisdiction with the superior court in civil as well as criminal matters. The result is that today they are the courts closest to the everyday life of the people, serving a most important need.

In their original inception they were not parts of a unified system; and, except for the creation of the appellate division and of the Administrative Committee of the district courts, they are individual courts, each going its own way without regard to the others. Except in those instances where the Administrative Committee has been given limited powers to supervise certain matters of administration, it is reasonable to say that no two district courts function in the same manner.

Originally, each such court had but a single justice; and, since, because of its limited jurisdiction, there was but little business, each justice was but a part-time judge, devoting most of his time to the practice of law or other pursuits. As the scope and powers of these courts was increased and enlarged, the justice became the presiding justice, with one, two or three special justices being appointed to sit whenever convenience or necessity so required. Of necessity these specials were, and are today, only part-time judges, just as are the presiding justices, each of them generally devoting most of their time to the practice of law. It appears to have become

the common practice for the presiding justices to sit for an hour or two in the morning on criminal and summary process matters, leaving the handling of civil matters on one or more days of the week to the special justices.

Although, except during the war years, business of the various district courts has increased considerably, the salaries of the presiding justices, which are not large because they are based on part-time service, have not been increased for many years. It is natural, therefore, that the presiding justices would desire to spend as much time with their own private practices as possible, even at the expense of rushing their duties in the courts. Likewise, since in most cases their pay is but nominal, it is natural that the special justices would desire to give no more time to their court duties than is compulsory.

In considering this report, it should be distinctly understood that the question relative to improving the district courts is not at all new. Over the years numerous legislative commissions have studied the question of raising their integrity and their efficiency and have made reports of their findings to the Legislature. Most of these reports have been severely critical of the situation which puts a man in the position of being at one and the same time a judge and an attorney at law maintaining a private practice. Members of the public as well as members of the bar and the justices themselves echo the same criticisms, most of which are entirely justified and stem from this confusing status wherein a man's personal interest as a practicing attorney interferes with and detracts from his duties and efficiency as a judge.

Neither is this question peculiar to Massachusetts. During the past several years the same problem relative to the lower courts has been receiving attention in many States. The Bar of the State of California has recently published a comprehensive report, with recommendations, on this problem as it relates to that State.

Up to this time the legislative attempts to improve the situation have been weak and ineffective. Slight

changes in the laws relative to the district courts have been made here and there; but there has been no overall plan which would weld these courts into a unified, efficient, soundly administered system which could command the respect and confidence that would in truth make them the "people's courts."

During the session of 1945 there were before the Legislature several bills relative to the district courts providing for increased compensation for presiding justices and for full-time service for standing justices of all of the district courts in certain counties or in certain of the busier district courts. These bills were referred to the joint legislative committee on the judiciary. Because of the great grist of matters before it and with but a limited time available, the committee found it impossible to recommend positive action on these proposals without a thorough study of their implications. To provide for such a study, the committee, therefore, recommended a resolve for a study by a special commission consisting of the members of the joint legislative committee on the judiciary and one person to be appointed by the Governor.

This resolve was enacted into law as chapter 66 of the Resolves of 1945. The governor appointed Russell S. Riley, Esq., a lawyer from Braintree, as the additional member.

The Commission held its organization meeting at the State House on September 21, 1945, electing Senator John D. Mackay of Quincy as chairman, Representative William E. Ramsdell of Winchester as vice-chairman, and Lowell S. Nicholson, Esq., of Boston, as secretary.

Several public hearings and executive sessions were held at the State House and a public hearing was held in the Municipal Auditorium in Springfield. Bar associations were asked to send representatives to these hearings and sessions; presiding and special justices and clerks of the district courts, members of the Administrative Committee of the district courts and members of the public were invited to attend and be heard. Representatives from all of these groups attended and participated

in the discussion of the matters to be studied. Nearly all, including representatives of the Administrative Committee, expressed vigorous opposition to the too long existing condition wherein the justices of the district courts are part-time judges and part-time practicing lawyers, it being their belief that such a dual status is the factor which contributes most to the evils which are inherent in the district courts. Their demands for a change to full-time service by the justices and for a uniform system of administration of these courts were overwhelming.

Necessary as it may have been when the district courts had their beginnings, the policy which requires the justices to be part-time judges while still maintaining their private practices has become their worst disadvantage and the main obstacle to the dispensation of sound, efficient, economical, well-administrated justice. The evidence submitted to this Commission makes it glaringly clear that the evils arising out of this dual status of judge and lawyer are manifold. A brief review of some of these evils, as set forth in the following paragraphs, should be sufficient to enable even a layman to agree with this contention.

The salaries of the presiding justices, except in rare instances, are not sufficiently large to permit them to give their full time to their judicial duties. Neither is the per diem compensation of the special justices sufficient to permit the special justices to give any more time to their judicial duties than is barely necessary to give a semblance of justice. As a result, the district courts are fast becoming known as the "hurry-up"courts.

Under the present "hurry-up" method of administration of justice, the presiding justice generally sits in his court in the morning to hear the criminal matters and those relating to summary process. In most instances he finishes this work within an hour or an hour and a half, returning to his own office for the rest of the day to pursue his private practice as a lawyer. He seldom hears civil matters, special justices being usually called upon,

with such civil session starting while the presiding justice is finishing his duties in the criminal session. Just as in the case of the presiding justice, the special justice, because his compensation is so small, hurries the cases before him and hastens to his own office to engage in his own law practice. Admittedly there can be but little deliberation under conditions such as these.

At this point the reader is bound to ask why, if the compensation is so low and insufficient, do men accept appointments as presiding or special justices of the district courts. The answer should be obvious: the prestige of being a "judge" attracts clients and pays dividends in the practice of law. While the actual salary or compensation of a "judge" may not be great, his total income is usually considerably enhanced by the fact that he bears such a title.

The title means so much to some of the special justices, especially in the metropolitan area, that it was often impossible to get one of the up to three special justices appointed to any district court to preside at a session where the services of a special justice were required. The situation became so bad in this respect that the Administrative Committee found it necessary to assign as many as eighteen special justices to certain district courts to insure the services of one special justice. Having received the title of "judge," it appears that their own private practice of law is more important to them than service on the bench.

Although there are some minor restrictions as to their right to private practice and they cannot practice on the criminal side of any court, they can, so far as civil matters are concerned, practice to their heart's content before the probate, the superior and the supreme judicial courts; and, generally speaking, there is no restriction on their right to most types of office practice. Presiding and special justices are retained by individuals and groups, including corporations, in the belief that their titles give them influence not had by the ordinary attorney and that

their prestige will bring a more favorable result to those who hire them. Whether or not they have such influence and obtain more favorable results for their clients, this condition is the ground for much criticism and is responsible for much of the existing lack of respect for the district courts.

The private practice of law by either a presiding or a special justice makes possible the abuse of the judicial power and tends to undermine the public confidence in the courts. Time after time in the trial of cases before juries in the superior court the fact that one of the attorneys is a "judge" is brought to the attention of the jury in some manner; even justices presiding at such a trial in the superior court have been known to address an attorney as "judge." If the party not represented by the "judge" loses he can hardly be blamed for feeling that his opponent won because of the influence of the "judge," who was his opponent's attorney.

If, on the other hand, the party not represented by the "judge" was successful and won his case in the superior court and, in a day or two thereafter, his attorney, for himself or for another party, appeared in the district court with the same "judge" presiding and lost, it might be thought (as it has been) that the "judge" was "taking it out" on the attorney for what happened in the superior court.

Although the presiding and special justices should be available at all times, it is often most difficult, particularly after the criminal session has been disposed of early in the morning, to find one of them to handle emergency matters.

Requests for rulings of law are important and deserve serious consideration; yet, because the official compensation of the "judge" is so low and his private practice is lucrative, such requests are not complied with promptly nor with the consideration they deserve. Reports to the appellate division are often unreasonably delayed. Small claims matters are often handled without sufficient con-

sideration; and it has been said by some attorneys that summary process matters are sometimes too summary so far as their consideration is concerned.

The criminal side of the district courts also has its faults. There appears to be no uniformity so far as the sentencing for certain crimes and misdemeanors is concerned; and any similarity in the manner of conducting criminal sessions in the various district courts seems to be purely accidental.

Certainly, but little pride can be taken in the handling, in general, of juvenile offenders. While it is true that there are so-called "juvenile sessions," very few of the justices do much to keep track of the behavior of juveniles after disposing of the case, either by probation or otherwise. This is true whether or not there happens to be a probation officer attached to the particular court. The fact that juvenile crime is on the rise should be sufficient evidence to support this contention.

It should be remembered that the policy of probation had its beginnings in Massachusetts. Yet, despite this fact, it cannot be said that we have a real probation system. If we have any system at all, it appears to be woefully weak and terribly lacking in effectiveness.

It is generally acknowledged that a great portion of our present crimes are committed by those who started out as juvenile offenders, many of whom, as first and second offenders, were placed on probation. This is a strong indication that much remains to be desired in the handling of juvenile offenders and of probation. The presiding justice of each district court should be in personal contact at all times with the records of all juvenile offenders in his district and of all persons under probation from his court.

The matter of administration of the district courts requires immediate and serious consideration. Because the presiding justice usually leaves the court so early in the day in order to care for his private practice, too many matters and too much responsibility are left to the clerk. This condition is most unsatisfactory and gives

little opportunity or incentive for the improvement in the methods of administration; nor does it tend to provide uniformity in the various district courts. The justices do not meet together often enough to exchange ideas for the improvement of the administration of the courts; and they will not meet oftener until they are made to be more interested in their duties.

Under the situation as it exists today the Administrative Committee has but limited power to help cure these difficulties. It is, perhaps, not too much to say that little can be done by the Administrative Committee in this respect until the district courts are presided over by justices who must give their full day to their judicial duties and who will be prohibited from engaging in the private practice of law.

It should be clearly understood that we offer no personal criticism of any presiding or special justice. They, like the members of the bar and the public, are victims of a situation which, like Topsy, just grew.

On the basis of all the evidence there can be no denying that unfortunate, unnecessary and undesirable conditions do, and will inevitably continue to, exist unless drastic changes are made.

The Minority Report takes great pains to set forth most carefully the evils existing in the district courts; yet, they submit no recommendations which can be said to offer an effective cure.

We are thoroughly convinced that any changes, to be effective, should be as nearly state-wide in scope as is practicably possible. We most strenuously disagree with those who contend that whatever changes are made should apply only to twenty selected courts in the more populous areas. It should not be forgotten that the district courts were never a part of a well-conceived plan. They were created "piece-meal" and their powers were increased "piece-meal." To advocate a plan that would not embrace practically all of the seventy-two district courts would amount to nothing more than another "piece-meal" job. The courts to which the minor-

ity would apply their changes are those in which the evils mentioned above exist only in a slight degree, if at all. Nothing would be accomplished since nothing would be done in the remaining fifty-two district courts in which those evils predominate. As to them, the confusion and lack of confidence would be just as great as it is now; and the criticisms would be just as numerous and just as warranted.

It is our considered recommendation that the presiding justices of all of the district courts, except those in Barnstable, Dukes and Nantucket counties, be required to devote their full time during the day to their judicial duties with their right to practice law, directly or indirectly, abolished. Their salaries should be made sufficient to make up, in part at least, for the loss of income ordinarily derived from the practice of law and to attract qualified men to the judiciary in the future. In fairness to those presiding justices who might prefer to give all of their time to the practice of law rather than remain on the bench and devote their full time to their judicial duties, we recommend that, provided they resign within one year, they be given reasonable pensions even though not otherwise eligible for retirement pensions.

Having placed all the justices, except in the three counties mentioned above, on full-time service, we recommend that the supervisory powers of the Administrative Committee of the district courts be considerably broadened. Recognizing that the business of some courts is considerably greater than others, we believe that the Administrative Committee should have the power to assign justices from the less busy courts to assist in disposing of the business of the larger courts where, if the district courts are going to do what they should in the manner and to the extent they should, there will often be considerably more judicial matters than can be successfully handled by one justice.

We would retain the present seventy-two district courts and would not disturb the various sittings as at present provided in various towns of each district. We would

recommend, however, that, except in Barnstable, Dukes and Nantucket counties, no vacancy in the office of presiding justice be filled unless recommended by the Administrative Committee. So long as such a vacancy exists the Administrative Committee would assign one or more justices from the less busy courts to take over the judicial duties of that court.

Special justices, except in Barnstable, Dukes and Nantucket counties, should be assigned to sit only when a full-time justice is not available; and, except in those same counties, no vacancy in the office of special justice in any district court shall be filled.

The resignation of special justices, except in Barnstable, Dukes and Nantucket counties, should be encouraged by providing a sufficiently attractive pension upon resignation within one year of the effective date of legislation authorizing such resignation. Any special justice failing to take advantage of these special retirement provisions would be entitled to only those pension allowances now in effect.

If these recommendations are enacted into law the principal cause of the evils of the district courts, except in the three counties mentioned, will have been wiped out — there will be no more judges hurrying their court sessions so that they may return early in the day to their own private offices to engage in the practice of law.

Many of the much-to-be-desired improvements can then be inaugurated; and confidence in and respect for these courts will return so that they will really become the "people's courts".

It should be pointed out here that the justices of the Boston Municipal Court, which is in effect a district court, and the justices of the superior court are full-time judges and are prohibited from practicing law; and, no doubt, that is the principal reason that there is so little criticism of those courts.

With the advent of full-time justices in the district courts there will be no more "hurry-up" courts in Massachusetts, except in Barnstable, Dukes and Nantucket counties.

The judge, being available for the day, can start his civil session within a few minutes after having finished the criminal session. No case will have to be hurried; and each will get the consideration which it merits. There will be plenty of time to consider requests for rulings of law and for the proper drafting of the rulings and there need be no unreasonable delay in reports to the appellate division. Small claims matters can be heard without being rushed and summary process matters can be given more reasonable consideration. The justice will always be available for emergency matters.

Since none of these justices will be permitted to practice law, no party to any action can feel that he is being imposed on because of the influence wielded by his opponent's attorney, who cannot at the same time be a "judge."

While the placing of the justices on full-time judicial service will do much to increase the stature of the district courts, further powers of a supervisory nature must be given to the Administrative Committee to make certain that these courts will not again have a relapse and fail in their duties to the public. They must be made to be a part of an effective system. The Administrative Committee should be given sufficient power to provide, by rule, regulation or requirement, uniformity in practice, rules, procedure and court hours. They should be permitted to set up systems for the handling of juvenile cases, of probation matters and of sentencing for crimes and misdemeanors, so that the administration of such matters will be sound and uniform throughout the Commonwealth.

In formulating such rules, regulations and requirements and in setting up such systems they should be permitted to require the assistance of such full-time justices as they may require; and, in order that all of the justices may be fully informed as to all administration matters, and to promote co-ordination in the work of the courts, the Administrative Committee should have the right to call, at such times as it deems necessary, conferences of

any or all of the justices of, or any officers connected with the district courts, including the Municipal Court of the City of Boston. The committee should also be permitted to require the keeping of such records as may be helpful in the development and maintenance of proper and effective administration.

To compel compliance with its rules, regulations and requirements and with the provisions of chapter 218 of the General Laws, or any of its orders, the Administrative Committee should be empowered to report any noncompliance to the chief justice of the supreme judicial court for such appropriate order as the supreme judicial court may make relative thereto.

In order that the courts may continue to be improved, the Administrative Committee should be empowered to make recommendations to the General Court relative to any matters pertaining to or affecting the district courts.

There can be little doubt that the clerks have an important function in the operation of the district courts. With the inauguration of full-time service by the justices the work of the clerks and assistant clerks will be increased, although not to an equal degree in each court. In many of the larger courts it is recognized that the clerks devote most of their time to their court duties; but the same does not hold true for all the courts, and in many instances the clerks devote only a small portion of their time to their official duties. It is obvious, therefore, that the clerks of the smaller courts will have to give up more of their personal time for their duties than will those of the larger courts when the justices of the courts are placed on full-time judicial service. In recommending increases in compensation for clerks because of added work we have taken this fact into consideration by providing for increases on a graduated scale in amounts of from 10 to 30 per cent, the larger percentages going to clerks of the smaller courts. We make such recommendations merely as a first step in adjustment of compensation. As the second step, we recommend that the ques-

tion be further studied by the Administrative Committee and that they, in turn, make recommendations back to the Legislature.

As a prelude to their suggestions for improvements in the district courts, our colleagues who have signed the Minority Report state as follows: —

> The evils which permeate our district court system are inevitable while the justices continue to act in their present dual capacity of judge-lawyers, for it is that very status which creates the evils. The justices of the district courts and the lawyers of the Commonwealth who practice in those courts are strong and united in their denunciation of our present system of part-time judges and in their demands for improvements. As between part-time judges and full-time judicial service all the arguments favor the system under which a judge is always a judge and never anything but a judge.

Yet, after admitting that all the arguments favor full-time judicial service as the means of wiping out the evils of the district courts, they immediately avoid the issue by proposing mere half-steps as a solution.

From the nature of their proposals and of the reasons in support of those proposals it is apparent that the fear of the additional cost of full-time justices in the sixty-eight district courts included in our plan prevents them from joining us in our recommendations. We are sincere in our belief that their fears are unjustified, particularly when the advantages to be gained by full-time judicial service are recognized.

There are times when it is folly to be penny-wise and pound-foolish; and the legislative records show that we who make these recommendations usually have given great study to any matters involving large expenditures of money before giving them our approval. In the instance of the matters under discussion we know that the question of additional cost is most important and we believe that we have investigated that phase of the problem more thoroughly than have our colleagues of the Minority Report.

Based on figures submitted to us by the Administrative Committee on November 27, 1946, it may be reasonably

estimated that the cost of the salaries of the justices and the compensation of the special justices for the year 1946 will amount to approximately $432,337. Since our recommendation for full-time judicial service excludes the four district courts in Barnstable, Dukes and Nantucket counties, where the salaries of the justices and the compensation of the special justices make a total of $14,108, the total of such salaries and compensation in the sixty-eight courts, to which our recommendation applies, is $418,229. Of this last-mentioned amount, $278,500 is for salaries of the justices and $139,229 is for compensation of special justices.

Even though no substantial improvements were to be made in the district courts and none of the justices were to be put on full-time judicial service, it is generally believed that there will be a large increase in the business of the district courts. There has been a recession of such business during the war years; and if the expected increase should bring the level of business in those courts up to that of the year 1940, the number of simultaneous sessions would be doubled, thereby causing an increased cost of about $140,000 for additional compensation for special justices.

At $8,000 per year, the salaries of the justices of those sixty-eight courts will come to $544,000. This will mean an increase of $125,771 over the estimate of the salaries of justices and compensation of special justices for the current year, or an average increase per court of only $1,849.57, which certainly cannot be said to be excessive if the gains to be made are given proper consideration. Not only is this increase of $125,771 not excessive; it does not even equal the increase of approximately $140,000 for additional compensation to special justices if the business of the courts reaches that of 1940 and no changes in administration are made.

Even with the salary set at $9,000 per year the added cost over the year 1940 will be only about $55,000.

Under such circumstances, failing to take advantage immediately of the benefits to be derived from full-time

judicial service, as provided in our proposals, would, in our opinion, delay for years any substantial improvement in the district courts, improvements which the people for whom they were established, have the right to expect.

As one justice, long connected with the administrative side of these courts puts it, "If the Commission plans to do anything about reorganizing the district courts, it should do it throughout the entire State and not fiddle around with some but not all of the courts." Asked if the plan as recommended by us is a sound step forward in improving the district courts, this justice answered, "Unquestionably, yes. This is the ideal solution. . . ." He also said that full-time judicial service will mean more entries and more trials in the district courts, and that the changes suggested in our proposal would be followed by better service.

We, like our colleagues of the Minority Report, would object seriously to any proposal which would contemplate continued full-time judicial service in any court which would not offer somewhere near enough work for such service. Unlike our colleagues, however, we do not apply our recommendations to the courts as they exist today where the justices, because they generally must give the greater portion of their time to their private practices, are in no position to give to their judicial duties the time and consideration that ought to be required. Instead, we have viewed this Commission's problem from the standpoint that these courts, established for the people, should be so improved that the main objective will be to give sound, efficient service to the public rather than, as appears to be now, for the convenience of any justice who also practices law.

As we have already pointed out, under full-time judicial service the justices will always be available; the difficulty of getting a special justice to preside will no longer exist; seldom will special justices be called on for judicial work; the full-time justice will preside over both criminal and civil sessions; and no case will have to be hurried. The justices will have sufficient time for drafting sound

rulings and for reporting cases without undue delay. Summary process matters and small claims will get the consideration they deserve.

Under its limited powers, it is generally admitted that the Administrative Committee has accomplished much in the matter of supervision of the courts. With the added powers, as herein recommended, it will be in a position to accomplish a great deal more. Under such supervision the justices would be able to co-operate with the Administrative Committee in the formulation of rules, regulations and requirements for practice and procedure in and administration of the courts; and they would be able to co-operate with the Administrative Committee in the development of sound and effective systems for the uniform handling of juvenile offenders, of domestic relations, or probation and of sentencing.

With the establishment of sound and effective systems for the handling of juveniles, domestic relations and of probation, with the expected post-war increase of business after the war-time recession and the increase of business to be brought about by these proposed improvements in the courts, with the time required to keep abreast of new statutes and decisions as well as with methods of administration, and with the possibility of being assigned from time to time to another district court to help dispose of an extra heavy docket, there should be but little doubt that a full-time justice of a district court, under our proposals, will, when the system gets under way, have a full load most of the time. We do not believe that similar claims can be made for the proposal of our colleagues by which they would require full-time service by the justices of only twenty courts.

We do not hesitate to acknowledge that some few of the justices may not be kept busy at the start under full-time judicial service; but we believe that immediate action is necessary and that, if anything constructive is to be accomplished in the way of improving the district courts, all of the sixty-eight courts contemplated in our plan must be included. In the course of a fairly short

time nature or other circumstances will cause vacancies in the office of justice in several of the courts. We have already recommended that no such vacancy be filled except on the recommendation of the Administrative Committee. In some instances, it might be found wise not to fill such a vacancy; and so long as such a vacancy exists our plan permits the Administrative Committee to assign other justices to carry on the business of the court. It has been intimated many times that there are too many district courts, which may be true. Informed sources seem to feel that the number might be reduced to a figure somewhere between forty-eight and fifty. On this particular point we draw no conclusion; but we believe that the best solution would be found in the recommendation of the Administrative Committee. If they do not recommend the filling of such vacancies, the number of full-time justices will be reduced from sixty-eight by the number of vacancies unfilled, with a proportionate saving in salaries and a taking by other justices of the load of the court having the vacancy.

We have no doubt that, with such an overall consideration of the factors involved, any full-time justice anxious to serve the public will, under our plan, have little spare time on his hands; rather will he find that his days are full to overflowing.

We have said that we are convinced that any changes to be effective, should be as nearly state-wide in scope as is practicably possible. It must be admitted that the proposals we offer apply to sixty-eight of the seventy-two district courts. The only courts we fail to include in our plan are the four district courts in Barnstable, Dukes and Nantucket counties; and the only reasons that we do not include them is that they are far removed geographically from the rest of the district courts and from each other. As the situation now exists it would be most impractical to expect that either of the justices of the two courts in Barnstable county, to say nothing of those in Dukes and Nantucket counties, might be assigned to

sit in any other court after having finished with the sittings in his own court.

This is not to say, however, that none of these four courts should ever be made full-time courts. To the contrary, we believe that, if the population and business of these three counties, particularly Barnstable county, continue to increase at the same rate as in recent years, it will be necessary to create new courts, or at least additional sittings, in that area. When that happens our plan can be extended to include that area.

Even though we have excepted those three counties from our overall proposal, we recognize the fact that, without casting reflections on their justices, something must be done to lessen the possibility of the continuation in those courts of the evils now so preponderant in the district courts. We believe that we can, by raising their salaries twenty per cent at this time, induce the justices of these four courts to give more of their time and thought to their judicial duties. We believe, also, that, when the need for new courts or new sittings of the existing courts in that region presents itself, recommendations for the enactment of legislation for that purpose should be made by the Administrative Committee.

In compliance with the provisions of the resolve by which this commission was established, we attach, as appendices hereto, drafts of legislation for the purpose of carrying into effect the recommendations we have set forth herein. The titles of these drafts of legislation are as follows: —

Appendix A. — An Act Further Defining the Law Relative to Justices of District Courts.

Appendix B. — An Act Relative to the Retirement of Justices of Certain District Courts.

Appendix C. — An Act Further Amending the Laws Relative to Special Justices of District Courts.

Appendix D. — An Act Relative to Retirement of Special Justices of District Courts.

Appendix E. — An Act Further Amending the Law Relative to Clerks and Assistant Clerks of District Courts.

Appendix F. — An Act Further Regulating the Membership, Powers and Duties of the Administrative Committee of District Courts.

It should be clearly noted that we, unlike those who have signed the Minority Report, make no recommendation for futher study at this time by this or any other legislative commission. To do so would be to admit that all of the time and effort expended so earnestly and steadfastly by most of the members of this Commission has been wasted; and such an admission would not be based on the facts.

It seems to us that the work of this Commission has done much to crystallize the thought expressed in the reports of the various legislative commissions and committees which preceded this Commission in the task of studying and making recommendations relative to the district courts; and upon the crystallization of those thoughts is found the basis of the proposals which we offer here to bring about a sound, efficient and integrated court system.

The most recent of those prior studies was conducted in 1941 by the members of the legislative committee on the Judiciary acting as a special committee of the Legislature. In House, No. 2770 of 1941, its majority report to the General Court laid the cause of most of the evils in the district courts to the fact that the private practice of justices interfered with their judicial duties and to the fact that there was a lack of central control over the administration of the several courts.

Six members of our present Commission were members of that special committee and signed the above-mentioned report which contains, on page three, the following statement: —

> It seems to this Commission that the logical cure for the foregoing defects and abuses lies in the ultimate reorganization of the system, to the end of bringing about full-time service on the part of the jus-

tices, with a provision for adequate compensation, prohibited practice of law and central control.

One of the recommendations made at that time and enacted into law prohibited the filling of any vacancy in the office of special justice in any district court so long as there is one special justice in such court. The reason given, on page five of the report, for the adoption of this proposal was "to the end that at some time in the not too distant future the judicial personnel of the district courts will be small enough to permit the working out of an efficient and more ideal system." Under this amendment the number of special justices has been substantially reduced. It is for the same objective that we propose that no vacancy in the office of special justice shall be filled.

Stating the belief that "such a measure is essential as a foundation for ultimate reform, and that it is a first step toward reorganization," the special committee recommended and the Legislature enacted a law establishing a new Administrative Committee of the district courts with limited supervisory powers over the courts. We believe that the Administrative Committee has done excellent work under the new law; but we believe that the committee will be able to do even more praiseworthy work in improving the administration of the courts and increasing their prestige and stature if its supervisory powers are enlarged as we have recommended.

Of particular interest in connection with the 1941 report of the special committee is the "Supplementary Statement" appearing on page six, which is signed by John D. Mackay, Richard S. Bowers, Ralph V. Clampit, Arthur I. Burgess and Benjamin R. Priest, the first three of whom are members of our present Commission, and which reads as follows: —

We, the undersigned, although concurring in the report of the majority, wish to express our opinion that the measures recommended by the Committee do not go far enough in curbing the abuses complained of in the district court system.

We believe that the most serious abuses complained of are: —

1. The practice of law by district court judges seriously restricts the time they can devote to their judicial work; and as to some judges gives rise to interests which conflict with the performance of their judicial duties.

2. Most of the district court standing justices, who are fairly well paid for part-time work, sit only during the brief criminal sessions of their courts, calling in special justices for civil sittings — at increased expense to the counties.

3. Special justices of the district courts commonly sit only a portion of a day, for which they receive a full day's compensation, and postpone unfinished cases to other days — to the great expense and inconvenience of the counsel and litigants.

We believe that the remedy for the aforementioned abuses is as follows:

1. All district court judges should be required to devote their full time to their positions, giving up the practice of law. For this sacrifice they should be compensated by an adequate increase in salary.

2. Judicial districts which are not large enough to require the full time of a judge should be enlarged by adding adjoining districts, the judges holding court at the several courthouses within the enlarged district on days that will serve the convenience of the litigants.

A comparison of our recommendations with the remedies suggested in the above "Supplementary Statement" is startling, particularly in that our recommendations set forth in clear-cut fashion the objectives of the signers of that statement and provide for their accomplishment without too long delay.

Our proposals were not drawn up in a last-minute attempt to have something to report to the Legislature. The fact is they are substantially the recommendations of a sub-committee, consisting of Senator Clampit, Representative Carman and Russell S. Riley, Esq., which was appointed by the chairman in compliance with a vote of our Commission and which spent considerable time and effort in the problems before us.

Drafts of the recommendations of that sub-committee were, with the approval of the Commission, sent out to representatives of the justices, to bar associations and to others; and considerable favorable comment relative to

them was received. In a letter to the sub-committee, dated February 1, 1946, on behalf of the Bar Association of the City of Boston a committee of that association through its chairman, Asa S. Allen, Esq., wrote as follows: —

> The Committee of the Bar Association of the City of Boston, appointed to consider the various bills relating to our district court system, has carefully examined all of the measures.
>
> We endorse without qualification the recommendations contained in the report of the sub-committee dated January 12, 1946, and the further proposals embodied in Mr. Nicholson's letter of January 24 to the members of your Commission.
>
> There already has been much discussion of needed improvements in the organization of our district court system, but thus far little has been accomplished. We believe that the time is now ripe for constructive action and urge your serious consideration of the recommendations referred to above.

Since they come from individuals and organizations whose knowledge of the existing conditions is the result of years of association and contact with the district courts, the endorsements of our proposals, which we have cited and which are but a few of the many received, should lend great weight to their favorable consideration by the Legislature.

In respectfully submitting these recommendations to the General Court, we believe that it will be truly recognized that all of the evidence favors the change to full-time judicial service and that any further delay will dangerously handicap the possibility of any future efforts to substantially improve the conditions prevalent in these courts.

Not only are these proposed changes essential to the best interests of sound and efficient service to the public; but, if favorably acted upon at this time, they will clear up an otherwise most perplexing legislative problem of long standing.

It is more than clear to us that now is the time to make the changes contemplated by our recommendations so that

the people may receive the vast benefits which these changes will bring about and to which they have every right. To those ends we hereunto subscribe our names.

RALPH V. CLAMPIT.
WILLIAM P. GRANT.
J. PHILIP HOWARD.
FREDERICK C. HAIGIS.
LESTER B. MORLEY.
ERNEST W. CARMAN.
JAMES F. CATUSI.
JEREMIAH J. SULLIVAN.
CHARLES D. DRISCOLL.
GEORGE T. LANIGAN.
RUSSELL S. RILEY.

SUPPLEMENTARY STATEMENT BY REPRESENTATIVE CATUSI.

I am not in accord with that part of the Majority Report which leaves to the discretion of the Administrative Committee the filling in of any vacancies which may occur. I believe that we should retain all the present existing district courts, excepting perhaps the courts in Barnstable, Dukes and Nantucket counties.

JAMES F. CATUSI.

PROPOSED LEGISLATION.

APPENDIX A.

The Commonwealth of Massachusetts

In the Year One Thousand Nine Hundred and Forty-Seven.

AN ACT FURTHER DEFINING THE LAW RELATIVE TO JUSTICES OF DISTRICT COURTS.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

SECTION 1. Chapter 218 of the General Laws is hereby amended by inserting after section 6, as amended, the following section: —

Section 6A. The justice of each district court, except the municipal court of the city of Boston, the Boston juvenile court and the district courts in the counties of Barnstable, Dukes and Nantucket, shall devote his entire time during ordinary business hours to his duties as justice, and shall not, directly or indirectly, engage in the practice of law. He shall sit in his own court and, in addition, perform such other duties as district court justice as the administrative committee may from time to time assign to him.

SECTION 2. Said chapter 218 is hereby further amended by striking out section 15, as amended, and inserting in place thereof the following section: —

Section 15. The justices of the district courts, other than the municipal court of the city of Boston, with the approval in each instance of the administrative committee of the district courts, and the justices of the municipal court of the city of Boston in their sole discretion, shall prescribe the times for holding civil and criminal trials in their respective courts except where such times are established by law, or by said administrative committee under authority of law, and the hours when their respective courts shall open for the transaction of business, and shall also prescribe reasonable daily office hours for the clerks of their respective courts, during which hours the offices of such clerks shall be open. Such hours shall be fixed with reference to the business of said courts and the convenience of the public and of attorneys, and notice thereof shall be posted in a conspicuous place in the offices of the respective clerks. Clerks shall also keep their offices open whenever the court so orders.

SECTION 3. Said chapter 218 is hereby further amended by striking out section 43, as amended, and inserting in place thereof the following section: —

Section 43. The justices, or a majority of them, of all the district courts, including the municipal court of the city of Boston and the Boston juvenile court, shall once annually, or oftener if required to do so by the administrative committee, meet in joint session for the purpose of making recommendations to the administrative committee, not inconsistent with law,

relative to the administration of the work of the district courts and the equitable distribution of such work among the justices thereof; and, without limiting the generality of the foregoing, may make recommendations to said administrative committee relative to the time for the entry of writs, processes and appearances, the filing of answers in civil actions, the preparation and submission of reports, the allowance of reports which a justice shall disallow as not conformable to the facts, or shall fail to allow by reason of physical or mental disability, death or resignation, the reporting of cases reserved for report when a justice shall fail to report the same by reason of physical or mental disability, death or resignation, the granting of new trials, and the practice and manner of conducting business in cases which are not expressly provided for by law, including juvenile proceedings and those relating to wayward, delinquent and neglected children.

SECTION 4. Said chapter 218 is hereby further amended by striking out section 77, as amended, and inserting in place thereof the following section: —

Section 77. Except as otherwise hereinafter provided, the salary of the justice of each district court, except the municipal court of the city of Boston and the Boston juvenile court, shall be dollars. The salary of the justice of the district court of Dukes county shall be dollars, the salary of the justice of the district court of Nantucket shall be dollars, the salary of the justice of the first district court of Barnstable shall be dollars and the salary of the justice of the second district court of Barnstable shall be dollars.

SECTION 5. Said chapter 218 is hereby further amended by inserting after section 81, as amended, the following section: —

Section 81A. A justice of a district court, other than the municipal court of the city of Boston, the Boston juvenile court and the district courts in the counties of Barnstable, Dukes and Nantucket, assigned to duty in a court other than his own by the administrative committee shall receive from the county in which the court to which he is assigned is located his traveling expenses necessarily incurred, such expenses to be computed from the town wherein his own court is located to the place where he so holds court. All expenses allowed under this section shall be subject to the approval of the administrative committee.

SECTION 6. Section seventy-six of said chapter two hundred and eighteen, as amended, and sections seventy-eight and eighty-two of said chapter, as appearing in the Tercentenary Edition, are hereby repealed.

SECTION 7. Said chapter 218 is hereby further amended by inserting after section the following section: —

Section 00. No vacancy in the office of a justice of a district court shall be filled until written recommendation relative to the filling of such vacancy shall have been made by the administrative committee.

SECTION 8. This act shall become effective January second, nineteen hundred and forty-eight.

Appendix B.

The Commonwealth of Massachusetts

In the Year One Thousand Nine Hundred and Forty-Seven.

AN ACT RELATIVE TO THE RETIREMENT OF JUSTICES OF CERTAIN DISTRICT COURTS.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

SECTION 1. Section 65A of chapter 32 of the General Laws, as amended, is hereby further amended by adding at the end the 2 following paragraphs: —

Any provision of this section to the contrary notwithstanding, any justice of a district court, including in such term the municipal court of the city of Boston and the Boston juvenile court, who has served as a special justice and as a justice of such a court for a total period of not less than ten years shall, if otherwise eligible, be entitled upon his retirement or resignation to receive the benefits of this section.

The service of such justice as a member of the armed forces of the United States, or as an officer or employee of any agency of the federal government, during World War II, so called, shall not be considered as having interrupted the tenure of office of such person as such justice, and the period of any such service shall be included as a part of the ten-year

period next preceding retirement or resignation, hereinbefore referred to.

SECTION 2. Any justice of a district court, other than the municipal court of the city of Boston and the Boston juvenile court, who retires or resigns under authority of any provision of section sixty-five A of chapter thirty-two of the General Laws, as most recently amended by section one of this act, within one year following the effective date of this act, shall, if otherwise entitled to the benefits of said section, be entitled thereto although he has not then attained age seventy and irrespective of the length of his service as such justice, and the amount of pension which he shall be entitled to receive for life upon such retirement or resignation shall be at an annual rate equal to of the annual rate of salary payable to him at the time of such retirement or resignation, to be paid from the same source and in the same manner as the salaries of like judicial officers of his court are paid; provided, that in no instance shall such amount of pension be less than dollars.

SECTION 3. This act shall become effective January second, nineteen hundred and forty-eight.

APPENDIX C.

The Commonwealth of Massachusetts

In the Year One Thousand Nine Hundred and Forty-Seven.

AN ACT FURTHER AMENDING THE LAWS RELATIVE TO SPECIAL JUSTICES OF DISTRICT COURTS.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

SECTION 1. Chapter 218 of the General Laws is hereby amended by striking out section 6, as amended, and inserting in place thereof the following section: —

Section 6. Each district court, except the municipal court of the city of Boston and the Boston juvenile court, shall consist of one justice and, except as otherwise provided in this chapter, one special justice.

In the district courts in the counties of Barnstable, Dukes and Nantucket each special justice shall be paid by his county for each day's service fifteen dollars, or at the rate by the day of the salary of the justice of his court, whichever is the greater amount. For each day's services, in any district court in Barnstable, Dukes or Nantucket county, of any special justice so paid for in excess of one hundred days in any one year, except for services in holding simultaneous sessions, there shall be deducted by the county treasurer from the salary of the justice of that

court one day's compensation at the rate by the day of the salary of said justice.

Special justices of district courts, except the district courts in the counties of Barnstable, Dukes and Nantucket and except in the municipal court of the city of Boston and the Boston juvenile court, shall be paid by the county at the rate of dollars for each half day of service and at the rate of dollars for each full day of service.

Special justices of the Boston juvenile court shall be paid by the county for each day of service at the rate by the day of the salary of the justice of said court.

SECTION 2. Said chapter 218 is hereby further amended by inserting after section 6, as amended, the three following sections: —

Section 6A. Any special justice of a district court, other than the municipal court of the city of Boston and the Boston juvenile court, may be assigned by the administrative committee to judicial service in any other district court except the two courts hereinbefore referred to.

Section 6B. No vacancy occurring in the office of special justice of a district court, other than the municipal court of the city of Boston, the Boston juvenile court, and the several district courts in Barnstable, Dukes and Nantucket counties, shall be filled.

Section 6C. No special justice of a district court, other than the municipal court of the city of Boston and the Boston juvenile court, whose practice includes the practice of motor vehicle tort cases, so called, may preside at the trial of any such case.

SECTION 3. Nothing in this act shall be deemed to abolish the office of special justice of a district court existing on the effective date of this act, or to remove, or to affect the rights, duties and powers, of any incumbent of any such office on such effective date, except as specifically provided in this act.

SECTION 4. This act shall become effective January second, nineteen hundred and forty-eight.

Appendix D.

The Commonwealth of Massachusetts

In the Year One Thousand Nine Hundred and Forty-Seven.

AN ACT RELATIVE TO RETIREMENT OF SPECIAL JUSTICES OF THE DISTRICT COURTS.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

SECTION 1. Chapter 32 of the General Laws is hereby amended by striking out section 65B, as amended, and inserting in place thereof the following section: —

Section 65B. A special justice of a district court, including in such term the municipal court of the city of Boston and the Boston juvenile court, who shall be retired under Article LVIII of the amendments to the constitution, or a special justice thereof sixty-five years of age or over who shall resign his office, after in either case having served as a special justice for at least ten years, shall be entitled to receive a pension for life at an annual rate equal to three fourths of his average yearly earnings as special justice during the period of ten years next preceding such retirement or resignation or at an annual rate equal to three fourths of his average yearly earnings as special justice during the entire period of his service in said

office, whichever is the higher rate, but not exceeding in any event an annual rate equal to three fourths of the annual rate of salary of the justice of his court or, in the case of the municipal court of the city of Boston, three fourths of the annual rate of salary of an associate justice of said court, payable from the same source and in the same manner as the salary of such justice or associate justice, as the case may be; provided, that the service of such special justice as a member of the armed forces of the United States, or as an officer or employee of any agency of the federal government, during World War II, so called, shall not be considered as having interrupted the tenure of office of such person as such special justice and the period of any such service shall be included as a part of the ten-year period next preceding such retirement or resignation hereinbefore referred to.

SECTION 2. Any special justice of a district court, other than the municipal court of the city of Boston, the Boston juvenile court and the several district courts in the counties of Barnstable, Dukes and Nantucket, who retires or resigns under authority of section sixty-five B of chapter thirty-two of the General Laws, as most recently amended by section one of this act, within one year following the effective date of this act, shall, if otherwise entitled to the benefits of said section, be entitled thereto although he has not then attained age sixty-five and irrespective of the length of his service as such special justice. The amount of pension to which he shall be entitled upon such retirement or resignation shall be as follows: — If he shall have so served for twenty years or more, not less than eighteen hundred dollars annu-

ally for life; if he shall have so served for fifteen years but less than twenty years, fourteen hundred dollars annually for life; if he shall have so served for more than ten years but less than fifteen years, one thousand dollars annually for life; and if he shall have so served for less than ten years, six hundred dollars annually for life.

SECTION 3. This act shall become effective January second, nineteen hundred and forty-eight.

Appendix E.

The Commonwealth of Massachusetts

In the Year One Thousand Nine Hundred and Forty-Seven.

An Act further amending the law relative to clerks and assistant clerks of district courts.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

Section 1. Chapter 35 of the General Laws is hereby amended by striking out section 49, as most recently amended by section 1 of chapter 512 of the acts of 1946, and inserting in place thereof the following section: —

Section 49. Every office and position whereof the salary is wholly payable from the treasury of one or more counties, or from funds administered by and through county officials, excluding the offices of county commissioners, the clerk and the assistant clerks of the superior court for civil business in the county of Suffolk, justices and special justices of the district courts, the messenger of the superior court in the county of Suffolk, clerks and assistant clerks of the district courts and excluding trial justices, other offices and positions filled by appointment of the governor with the advice and consent of the council, court officers appointed in Suffolk county under

section seventy of chapter two hundred and twenty-one, court officers in attendance upon the municipal court of the city of Boston, and probation officers, but including the officer described in the first sentence of section seventy-six of said chapter two hundred and twenty-one, shall be classified by the board in the manner provided by sections forty-eight to fifty-six, inclusive, and every such office and position, now existing or hereafter established, shall be allocated by the board to its proper place in such classification. Offices and positions in the service of any department, board, school or hospital principally supported by the funds of the county or counties, or in the service of a hospital district established under sections seventy-eight to ninety-one, inclusive, of chapter one hundred and eleven, shall likewise be subject to classification as aforesaid. The word "salary", as used in this section, shall include compensation, however payable; but nothing in sections forty-eight to fifty-six, inclusive, and nothing done under authority thereof, shall prevent any person from continuing to receive from a county such compensation as is fixed under authority of other provisions of law or as is expressly established by law.

SECTION 2. Section 4 of chapter 348 of the acts of 1946 is hereby amended by inserting after the second sentence the following sentence: —In addition to such regular compensation, effective on and after each clerk and assistant clerk referred to in the first sentence of this section shall receive the following increase in compensation, which shall also be deemed to be a part of his regular compensation: —

(1) If his regular compensation, as above deter-

mined, is four thousand five hundred dollars or more, it is hereby increased by ten per cent.

(2) If his regular compensation, as so determined, is less than four thousand five hundred dollars but not less than three thousand five hundred dollars, it is hereby increased by fifteen per cent.

(3) If his regular compensation, as so determined, is less than three thousand five hundred dollars but not less than two thousand five hundred dollars, it is hereby increased by twenty per cent.

(4) If his regular compensation, as so determined, is less than two thousand five hundred dollars but not less than one thousand five hundred dollars, it is hereby increased by twenty-five per cent.

(5) If his regular compensation, as so determined, is less than one thousand five hundred dollars, it is hereby increased by thirty per cent.

SECTION 3. This act shall become effective January second, nineteen hundred and forty-eight.

Appendix F.

The Commonwealth of Massachusetts

In the Year One Thousand Nine Hundred and Forty-Seven.

An Act further regulating the membership, powers and duties of the administrative committee of the district courts.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

Section 1. Chapter 218 of the General Laws is hereby amended by striking out section 43A, as amended, and inserting in place thereof the following section: —

Section 43A. There shall be an administrative committee of the district courts, other than the municipal court of the city of Boston, which shall consist of five justices of such district courts, appointed by the chief justice of the supreme judicial court, each for a period not exceeding two years as said chief justice may determine. Any such justice may be reappointed. The committee shall be authorized to visit any district court, other than the municipal court of the city of Boston, or any trial justice, as a committee or by sub-committee, to require uniform practices, to prescribe forms of blanks and records, and to superintend the keeping of rec-

ords by clerks and by trial justices. The committee shall have general superintendence of all the district courts, other than the municipal court of the city of Boston, and their clerks and other officers; but, except as otherwise provided by law, shall have no power to appoint any such officers. The committee may determine the number of simultaneous sessions which may be held by any such district court, the sittings of special justices, and, subject to the provisions of section fifteen, shall determine the times for holding criminal and civil sessions. The committee may provide that the hour of opening district courts shall be uniform throughout the commonwealth.

The committee may assign justices of district courts within a county, except Barnstable, Dukes and Nantucket, to sessions of other district courts within such county. Said committee may assign such justices in any county, other than Barnstable, Dukes or Nantucket, to sessions of district courts in any other county, except Barnstable, Dukes and Nantucket; may assign special justices to sessions of other courts in their own or any other county, and may provide for assignments or substitutions or relief, for both civil and criminal work, in order to take care of vacancies, sickness, outside assignments, vacations, appellate division or superior court work, special study projects or committees, and cases of emergency. Without limiting the generality of the foregoing, the committee shall require records to be kept which shall be available to the general court and which shall show the names of the justices and special justices holding court or a simultaneous session thereof, and any other information which may generally assist in the determination of the nature and

volume of all work done by any of such district courts; may plan, supervise and carry out work or study projects relating to probation, juveniles, rules, practice and procedure, and the like, with a view toward uniformity and co-operation among the several district courts, and assign such justices, not including special justices, to carry on such work; and may carry out the above duties to the end that, so far as possible, the judicial work of the district courts, other than the municipal court of the city of Boston and the Boston juvenile court, shall be fairly divided and that the justices of such courts, except in the counties of Barnstable, Dukes and Nantucket, will each have a full work load.

The committee shall have power to prohibit the practice of motor vehicle tort cases, so called, by the justices of the district courts in the counties of Barnstable, Dukes and Nantucket.

In the case of the refusal or failure of any justice or special justice, clerk or officer of any district court, other than the municipal court of the city of Boston, to comply with any order of the committee in performance of its duties and powers, established by any provision of this chapter, the committee shall report such person or persons to the chief justice of the supreme judicial court with a statement of such non-compliance, and, upon a finding, made after a hearing by said chief justice or any justice of the supreme judicial court to whom said chief justice may refer the matter, that such person has not complied with such order of the committee, the supreme judicial court shall forthwith make an appropriate order as to the matter involved.

The members of the committee shall be allowed

their necessary expenses, including clerical expenses, incurred in the performance of their duties, subject to the approval of the governor and council, and shall each receive as additional compensation for their services in the work of such committee fifteen hundred dollars per annum to be paid from the state treasury.

To promote co-ordination in the work of the courts, the administrative committee may call a conference of any or all of the justices of the district courts, including the municipal court of the city of Boston and the Boston juvenile court, or other officers connected with such courts, and the traveling expenses of such justices or officers for attending any such conferences shall be paid as the other expenses of their respective courts are paid.

The administrative committee may from time to time make reports to the general court, with its recommendations and with drafts of laws to carry such recommendations into effect, and may also from time to time make recommendations to the governor, relative to any matters affecting the district court system.

SECTION 2. This act shall become effective January second, nineteen hundred and forty-eight.

MINORITY REPORT

To the General Court of Massachusetts:

I. History of the District Courts.

The structure of the district court system in Massachusetts is a direct development of the ancient justice of the peace system of the Colonial and early Commonwealth periods. Over the course of a century and a half these justices' courts have evolved, always by separate enactments, through trial justices and police courts into our district courts and municipal courts of today, until now we have seventy-three independent and isolated courts, each continuing the local concepts and separatist traditions of its justice of the peace predecessors.

An understanding of this ancient origin of our lower courts makes clear why there is no *system* of district courts in Massachusetts today; and a realization of the always increasing demands which have been made upon these courts, keeping pace with the continual growth of population and of wealth in Massachusetts, explains the gradual and inevitable expansion of power and importance which has taken place during these years. Limited at their start to a jurisdiction of $300 in civil matters and to petty offences on the criminal side, our district courts now have unlimited jurisdiction in civil cases and they make final disposition of more than 90 per cent of the criminal business which comes into all our courts.

It is this very growth in the work of the district courts, resulting from the increased use by the public and the constantly enlarging jurisdiction conferred by the Legislature, which has given rise to the criticisms which have been made. As the demands upon the courts increase, criticisms become strong, then a legislative investigation is made, which in turn is followed by changes and improvements to meet the growing needs.

The increase in demands upon our district courts during the past quarter century has been without precedent. The improvements adopted by the Legislature — fore-

most among which are the creation (St. 1922, c. 532) and the strengthening (St. 1941, c. 682) of the Administrative Committee of the district courts, and the increase in uniformity and co-operation of the courts through the Committee's activities — have not kept pace with the increase in the work of the courts. And today, in this postwar period, we look forward to even greater demands upon our lower courts. It is but natural, therefore, that the criticisms against this branch of our judicial structure have also increased beyond precedent; and again today the Legislature is being called upon for another investigation and for further and more far-reaching changes in the district court system in order to meet these increased demands.

II. Present Criticisms.

Today's criticisms of our district courts are more precise than they have been in the past. The present criticisms are levelled against the policy of *part-time* judicial service still in effect in all our district courts except the Boston Municipal Court and the Boston Juvenile Court. All of the criticisms which are heard — and they are many and profound — stem directly or indirectly from this dual status of the justices and special justices of the courts as *judge-lawyers*, part of the time on the bench in a judicial capacity, and part of the time at the bar in partisan support of clients. This inherited feature of our judicial system has increasingly become the subject of attack; and in every report by committees or commissions during the past twenty-five years this archaic policy has been condemned, and the ideal has been stated of ultimate full-time judicial service in all our district courts. [1]

The present criticisms of our district courts are criticisms of the *system*, not personal criticisms of the indi-

[1] Report of the Judicature Commission, House, No. 1205 of 1921 (at page 52); Report of the Special Crime Commission, Senate, No. 125 of 1934 (at page 15); Report of Special Commission on Public Expenditures, Senate, No. 250 of 1934 (at pages 35-36); Report of Commission on the Judicial System, House, No. 1750 of 1936 (at page 18); Report of Judiciary Committee, House, No. 1719 of 1938 (at page 10); Report of Judiciary Committee on District Court System, House, No. 2770 of 1941 (at page 3). For a complete list of studies and recommendations by legislative and non-legislative commissions, see *Twentieth Report of the Judicial Council* (1944), page 29. See also Frank W. Grinnell's "The History of the District Court Discussion," *Law Society Journal*, February, 1945, page 431, and *Massachusetts Law Quarterly*, May, 1945, page 45.

vidual justices. The complaints are attacks upon the legislative status of the justices and special justices as *judge-lawyers*. For it is this inconsistent dual status which continually and inevitably produces situations which justify and require the strongest condemnation: —

1. *Judge-Lawyer.* — Too frequently the situation arises when a lawyer and his client or a lay person representing himself will negotiate adjustment of legal differences with the opposing attorney, and then the next morning the lawyer and his client or the lay person handling his own affairs will appear in a district court on another matter only to find that the opposing attorney now is his judge. Many attorneys in the Commonwealth have had this unfortunate experience, for which there is no possible justification.

2. *Influence.* — Many individuals believe that if they retain as their lawyer a person who is a justice of a district court the "influence" of such attorney will help them obtain a favorable decision in their matters. Whether true or not, the prevalence of this feeling that a judicial decision will be influenced and affected if one's lawyer is a judge is a terrible reproach on the administration of justice in Massachusetts; a reproach for which the judges are rarely responsible, but which arises inevitably from their inconsistent dual status.

3. "*Hurry-up.*" — The district courts are more and more becoming known as the "hurry-up" courts of the Commonwealth. This cannot be avoided in our present system, for the salaries paid to the justices are based upon the theory that the justices will earn their livelihood by outside professional work. A judge appointed upon such a theory cannot stay on the bench until all matters have been completed, for he must give attention to his outside duties. Under this condition it is to be expected that the judge will continually be trying to "hurry-up" the parties before him and that he may not take adequate time to consider requests or to listen to arguments. This "hurry-up" feature of our present system cannot be avoided where the justice is a part-time judge-lawyer.

4. *Lack of System.* — A *system* of all the district courts

can be established only where the justices of the courts get together, assist one another, and try to benefit by the experiences of other justices. There is no time allotted or available for this kind of co-operation under the present system; and until it is provided that a part of the judicial work of the justices is to study and apply successful experiments initiated by other justices there can be no *system* in the district courts.

5. *Lack of Confidence.* — The dual status of the justices and special justices as judge-lawyers creates opportunities for the abuse of the powers residing in all judicial officers, and the existence of such opportunities for abuse is largely the basis for the lack of confidence in our district courts which exists in many quarters today. This lack of confidence is an established fact which cannot be changed while the system permits and there occasionally occurs an abuse of judicial power by one of our judge-lawyers. *Not until judges are kept on one side of the bench, rather than on both sides, will the public have confidence in our district courts.*

6. *Special Justices.* — In many of the courts special justices are called upon more frequently than the volume of work demands. In many sections of the Commonwealth it is a common occurrence for a standing justice to preside for an hour or two and then refer the business of his court to a special justice so that he himself may be free to return immediately to his private law office.

7. *Congestion in the Superior Court.* — The private practice of law by standing justices has, in the past, been contributory to some extent in causing congestion in the Superior Court. Attorneys and litigants are naturally loath to leave their cases in a district court where they know the justice is more interested in his private law business than he is in his judicial duties.

8. *Partners of Justices.* — In order to avoid public suspicion justices should not have law partners or associates, even if they do not practice actively themselves. Such partnerships or associations are responsible for the criticism that a standing justice, directly or indirectly, has influenced persons to employ his partners or associates as

attorneys. There have even been instances when a justice would allow a partner or associate to practice before him.

It is pertinent to note that there are no criticisms of the full-time justices of our Supreme or Superior Courts or even of the Boston Municipal Court comparable to those heard so frequently against the judge-lawyers of our part-time district courts.

III. Suggestions for Improvements.

The evils which permeate our district court system are inevitable while the justices continue to act in their present dual capacity of judge-lawyers, for it is that very status which creates the evils. The justices of the district courts and the lawyers of the Commonwealth who practice in those courts are strong and united in their denunciation of our present system of part-time judges and in their demands for improvements. As between part-time judges and full-time judicial service all the arguments favor the system under which a judge is always a judge and never anything but a judge.

The members of this Commission, therefore, are *unanimous* in their opinion and they now recommend that *the time has come for EXTENSION of the policy of full-time judicial service in the district courts of the Commonwealth.*

There is, however, strong divergence in the Commission as between (*a*) the gradual extension of this ideal of full-time judicial service and (*b*) the immediate application of this policy in *all* the district courts in the Commonwealth. The members signing this report favor: —

1. The immediate establishment of full-time judicial service in our busiest courts; and

2. The gradual future extension of full-time judicial service to other courts as further study and experiments and the recommendations of the Administrative Committee indicate that other courts are ready for this advanced step.

The question, therefore, is a question of how far this policy of full-time judicial service should be extended at the present time. The members of the Commission are agreed that there should be *some* immediate extension, but not as to *how much.*

With reference to full-time judicial service in every court in the Commonwealth, a minority of the Commission finds no answer to the objection that *you cannot have a full-time judge unless his jurisdiction supplies a full-time load.* Giving the judge full-time pay for half a judicial load merely robs the taxpayer.

It must constantly be kept in mind that a full-time load cannot be *legislated* for a part-time court. Figures demonstrate beyond question that in Massachusetts today and in the near future, even giving every allowance for the upsurge of business expected in the courts, there are only about a score of courts which have enough business for one full-time judge. The following courts appear to be the only ones in which the legislature would now be justified in establishing full-time adequately paid judicial positions:

Name of Court.	Held at —	Population (1940).	Load Units (1940).
1. Central Worcester	Worcester	236,074	43,982
2. First Eastern Middlesex	Malden	209,433	39,477
3. Springfield	Springfield	192,928	28,763
4. Third Eastern Middlesex	Cambridge	177,758	38,720
5. Dorchester	Dorchester	172,818	24 052
6. Roxbury	Roxbury	153,628	34,352
7. East Norfolk	Quincy	148,839	21,855
8. Third Bristol	New Bedford	137,294	11,324
9. Southern Essex	Lynn	136,400	19,579
10. Lowell	Lowell	133,080	14,496
11. Second Bristol	Fall River	128,844	10,498
12. Lawrence	Lawrence	124,849	8,845
13. West Roxbury	West Roxbury	113,902	11,619
14. Somerville	Somerville	102,177	15,020
15. First Essex	Salem	90,156	10,526
16. Chelsea	Chelsea	81,496	16,600
17. Brockton	Brockton	79,191	10,141
18. Second Eastern Middlesex	Waltham	79,037	12,728
19. Newton	Newton	69,873	13,431
20. Brookline	Brookline	49,786	13,128

Similar figures for our other fifty-two district courts are as follows:

Name of Court.	Held at —	Population (1940).	Load Units (1940).
21. East Boston	East Boston	76,477	11,676
22. South Boston	South Boston	53,720	10,580
23. Central Northern Essex	Haverhill	52,213	6,202
24. Holyoke	Holyoke	53,750	4,239
25. Hampshire	Northampton, etc.	64,904	4,999
26. Central Berkshire	Pittsfield	61,608	7,863
27. First Bristol	Taunton	56,432	5,118
28. Fourth Eastern Middlesex	Woburn	66,389	10,488
29. Fitchburg	Fitchburg	46,274	4,947
30. Northern Norfolk	Dedham	67,597	8,101
31. Brighton	Brighton	66,907	9,178
32. Franklin	Greenfield and Turners Falls	41,322	3,540
33. First Southern Worcester	Southbridge and Webster	44,034	7,435
34. Fourth Bristol	Attleboro	42,067	4,213
35. Second Plymouth	Abington and Hingham	43,170	4,915
36. Chicopee	Chicopee	41,664	2,633
37. First Northern Worcester	Athol and Gardner	41,334	3,806
38. Charlestown	Charlestown	31,663	7,415
39. First Southern Middlesex	Framingham	37,671	6,362
40. Eastern Essex	Gloucester	28,986	3,140
41. Western Norfolk	Franklin and Walpole	37,873	4,848
42. Central Middlesex	Concord	38,252	4,324
43. Second Southern Worcester	Blackstone, etc.	25,564	3,213
44. Western Hampden	Westfield and Chester	24,252	2,538
45. Northern Berkshire	North Adams	23,951	2,211
46. Marlborough	Marlborough	23,196	2,781
47. Second Eastern Worcester	Clinton	22,126	1,597
48. Newburyport	Newburyport	18,993	2,688
49. Third Plymouth	Plymouth	22,911	2,769
50. Peabody	Peabody	23,998	3,057
51. Leominster	Leominster	22,226	2,020
52. Western Worcester	East Brookfield	19,865	1,887
53. Third Southern Worcester	Milford	22,065	1,787
54. Eastern Hampden	Palmer	19,413	2,536
55. Fourth Plymouth	Middleborough and Wareham	23,553	3,475

Name of Court.	Held at —	Population (1940).	Load Units (1940).
56. Southern Norfolk	Stoughton and Canton	21,085	2,558
57. First Northern Middlesex	Ayer	20,792	2,798
58. First Eastern Worcester	Westborough and Grafton	18,533	2,019
59. Fourth Berkshire	Adams	14,930	1,321
60. Second Essex	Amesbury	14,370	1,573
61. First Barnstable	Barnstable and Falmouth	22,607	2,937
62. Second Barnstable	Harwich and Provincetown	14,689	1,865
63. Southern Berkshire	Great Barrington	10,803	1,515
64. Natick	Natick	13,851	3,044
65. Lee	Lee	10,397	1,313
66. Eastern Hampshire	Ware	7,557	848
67. Eastern Franklin	Orange	8,131	665
68. Third Essex	Ipswich	6,248	713
69. Winchendon	Winchendon	6,578	1,009
70. Dukes County	Oak Bluffs, etc.	4,920	489
71. Williamstown	Williamstown	4,381	671
72. Nantucket	Nantucket	3,401	187

The need for full-time judicial service in our busiest courts and the advantages which can be expected from this advance in the administration of justice in Massachusetts warrants the immediate extension of this plan to the twenty courts first above named.

The members of the Commission signing this report are opposed to present extension of full-time judicial service beyond the twenty courts first named. Although there is unanimous agreement that judges should not be lawyers, it is equally accepted that the lack of work in most of our courts creates an impossibility of setting up full-time judicial service throughout the entire Commonwealth (unless there be actual consolidation of judicial districts with a fairly drastic elimination of smaller courts, and it is doubtful that such a step could be successfully attempted at this time). A judge who cannot practice law, must be paid a full-time judicial salary, but the judicial work in most of our district courts is so small that it is an economic impossibility to give a full-time salary

for the performance of judicial work which occupies only a fraction of full-time service. The ideal of full-time judges is practical only when it is applied to courts which offer somewhere near a full-time job.

Over a period of almost two hundred years the judicial system in Massachusetts has expanded and has improved, but it should be noted that these improvements have come about gradually and as a result of small-scale experiments. The members signing this report believe that such a process is the only one which can be relied upon in order to continue to bring about improvement in our system. The full-time service in the Boston Municipal Court, started as an experiment many years ago, now calls for the extension of that system to other courts which have reached the appropriate stage of development. The fact that such a system has succeeded in the Boston Municipal Court is, of course, no indication that like success could be obtained by applying such a system to an entirely unlike court. We believe that it is necessary that extension of full-time judicial service be limited to those district courts in the Commonwealth which have enough work or nearly enough work to occupy one justice for a full-time job.

To apply a system of full-time judicial service throughout the Commonwealth to every one of our seventy-two district courts irrespective of their size would be so wasteful that such a step might prejudice or even block any further improvement in our judicial system. The undersigned couple with their recommendation that progress to full-time judicial service be extended to the twenty largest and busiest courts, the further recommendation that provision be made for a continued extension of such system to other district courts as such courts grow and as future experience indicates methods by which and when this full-time service can be further extended.

IV. Salaries of the Justices.

The extension of full-time judicial service in our district courts should be upon a basis comparable to the present

service in the Boston Municipal Court. We therefore recommend that an annual salary of $9,000 be given to the justices of those courts which are placed upon a full-time basis.

It has been more than twenty years since any increase in the basic pay of our district court justices has been granted, this in spite of the tremendous increase in work and the greatly increased burden of Federal taxes. We believe and recommend that fairness requires a straight 20 per cent increase in compensation, over and above the amounts being paid at the present time, to all part-time standing justices whose salaries have not been increased by the 1945 or the 1946 Legislature.

The compensation of special justices was adjusted in 1945 (c. 611), and there does not appear to be any unfairness in continuing this system of pay without change.

V. Recommendations.

The undersigned members of the Commission make the following four recommendations for legislation, drafts of which are attached to this report:

1. That full-time judicial service be required of the standing justices in the twenty district courts listed on page 55 of this report.

2. That further extension of this policy of full-time judicial service in the district courts be prepared for through studies of its operation in the twenty courts referred to above and upon the further recommendations of the Administrative Committee.

3. That the salaries of all standing justices in our district courts, except the twenty courts named above and the Boston Municipal Court and the Boston Juvenile Court, and except the courts wherein the salary of the presiding justice was increased in 1945 or in 1946, be increased by 20 per cent above the amounts now being paid to said justices.

4. That this Commission be continued in force, and that the Administrative Committee be directed to report to this Commission, from time to time, concerning the

operation of full-time judicial service in said twenty district courts and also its recommendations for further extension of full-time service to other district courts.

JOHN D. MACKAY.
RICHARD S. BOWERS.
CHARLES J. INNES.
WILLIAM E. RAMSDELL.
STUART C. RAND.
WILLIAM E. HAYS.
EDMOND J. DONLAN.

SUPPLEMENTARY STATEMENT BY REPRESENTATIVE DONLAN.

While I agree there has been severe criticism of our district courts, much of which is justified, I do not agree that the public lacks confidence in these courts. On the contrary, our district courts are highly regarded by the public, and rightly so. In my opinion many of the abuses cited have been corrected since the recent strengthening of the Administrative Committee of the district courts by the partial prohibition against practice by special justices. I believe that the evidence of abuses given to the Recess Commission were largely of conditions which formerly existed. Yet, in spite of all the reforms and improvements inaugurated by the Administrative Committee and the judges of the district courts, the feeling is still widespread among lawyers and judges that part-time judicial service inevitably leads to abuses. The witnesses appearing before the Recess Commission, including presiding justices and special justices, were almost unanimous in favor of a system of full-time judicial service.

In concurring with the recommendations of the Minority Report, I do so realizing that no system is perfect and that full-time district courts, without simultaneous ses-

sions, may in practice prove unpopular. Our district courts, with special justices holding simultaneous sessions, now operate expediently, efficiently and economically. Civil cases are called promptly at 9.00 or 9.30 in the morning for trial or other disposition, with a resultant saving of time for both lawyers and litigants. The public is now well served, with a minimum of inconvenience and hardship on witnesses.

However, after weighing the advantages and disadvantages of both systems, I am convinced that it is definitely in the public interest to extend the policy of full-time judicial service in the district courts of the Commonwealth as recommended in the Minority Report.

EDMOND J. DONLAN.

PROPOSED LEGISLATION.

APPENDIX G.

(RECOMMENDED IN MINORITY REPORT.)

The Commonwealth of Massachusetts

In the Year One Thousand Nine Hundred and Forty-Seven.

AN ACT RELATING TO THE JUSTICES OF THE DISTRICT COURTS.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

SECTION 1. Chapter 218 of the General Laws is hereby further amended by inserting after section 6, as amended, the following section: —

Section 6A. The justices of the Central Worcester, First Eastern Middlesex, Springfield, Third Eastern Middlesex, Dorchester, Roxbury, East Norfolk, Third Bristol, Southern Essex, Lowell, Second Bristol, Lawrence, West Roxbury, Somerville, First Essex, Chelsea, Brockton, Second Eastern Middlesex, Newton and Brookline courts shall be full-time justices, they shall devote their entire time during

ordinary business hours to their duties as justices, and they shall not directly or indirectly engage in the practice of law.

SECTION 2. Chapter 218 of the General Laws is hereby further amended by inserting after section 75, as amended, the following section: —

Section 75A. The salaries of the full-time justices specified in section six A of this chapter shall be thousand dollars.

SECTION 3. The annual salaries of the justices of the district courts, except of the Boston municipal court and the Boston juvenile court and the courts named in section one of this act, and except the courts wherein the salary of the presiding justice was increased in nineteen hundred and forty-five or in nineteen hundred and forty-six, are hereby further increased by an amount equal to twenty per cent of their basic salaries. This increase is in addition to the temporary increase granted by chapter four hundred and ninety-eight of the acts of nineteen hundred and forty-five.

SECTION 4. Section 78 of chapter 218 of the General Laws is hereby amended by striking out the word "three" in the second line thereof and inserting in place thereof the word: — four, — so that the first sentence of said section 78 shall read as follows: —

SECTION 5. Section 79 of chapter 218 of the General Laws is hereby amended by inserting at the end thereof the following: — In the courts specified in section six A of this chapter the salaries of the clerks

and of the various assistant clerks shall continue to be governed by the population scale in section sixty-eight, or by such other statutes as may now be in force regulating said salaries, as if no change had been made in the method of fixing the salaries of the justices of said courts.

APPENDIX H.

(RECOMMENDED IN MINORITY REPORT.)

The Commonwealth of Massachusetts

In the Year One Thousand Nine Hundred and Forty-Seven.

RESOLVE PROVIDING FOR THE REVIVAL AND CONTINUANCE OF THE SPECIAL COMMISSION TO STUDY THE DISTRICT COURT SYSTEM.

Resolved, That the special commission to study the district court system, created by chapter sixty-six of the resolves of nineteen hundred and forty-five, is hereby revived and continued. Said commission shall continue its investigation and study of the district court system of the commonwealth, and also of the operation of full-time judicial service in certain of said courts, and of the further extension of the policy of full-time judicial service in the district courts. The administrative committee of the district courts shall report to the commission, from time to time, or upon request of the commission, facts and information relating to full-time judicial service in the district courts, and also its recommendations for further extension of such type of judicial service. Said commission may expend for its future expenses and clerical and other assistance such sums not exceeding in the aggregate , as may hereafter be ap-

propriated therefor. Said commission shall report to the general court the further results of its investigation and study and its further recommendations for legislation, if any, by filing the same with the clerk of the senate on or before the first Wednesday of December in the year nineteen hundred and forty-seven.